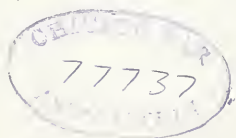


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BOUND FEB 9 '61

MUTUAL REALTY INC., a
Corporation,

Appellant,

vs.

GUS GAGIDIS,

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

12/60
42
298 I.A. 619

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Judgment by confession for \$4243.28 was entered; on petition filed and motion by the defendant the court vacated and set aside the judgment and plaintiff appeals.

The confession of judgment was entered upon a warrant of attorney contained in certain promissory notes or real estate bonds secured by a trust deed; defendant's motion to vacate was based upon the fact that the power of attorney to confess judgment ran to the Madison & Kedzie State Bank, who is not the plaintiff here. Nowhere in the power to confess judgment does the name of the Mutual Realty Inc., a corporation, the instant plaintiff, appear.

A power to confess judgment must be strictly pursued, and a departure from the authority conferred will render the judgment void. Keen v. Bump, 286 Ill., 11. And in Sharp v. Barr, 234 Ill. App. 214, it was held that where the warrant specifies a particular person in whose favor the judgment may be taken, it cannot be taken in favor of any other person. This case also holds that where no specific person is designated as beneficiary it becomes a matter of construction to ascertain who is meant. That is not the case here. Here the beneficiary is specifically named, and the court properly vacated and set aside the judgment.

For the reasons indicated the order of the Municipal court is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

MUTUAL REALTY INC., a
Corporation,

Applicant,

vs.

GUY GASTON,

Appellee.

228 I.A. 619

APPEAL FROM THE DECISION OF THE CIRCUIT COURT
IN THE DISTRICT OF COLUMBIA

Agreement by contract for \$443.25 at interest; no action
 filed and action by the defendant and the plaintiff and the
 the plaintiff and the plaintiff.

The contract of the plaintiff was entered upon a contract of
 attorney contained in certain promissory notes of real estate bonds
 secured by a trust deed; defendant's action to void was based
 upon the fact that the power of attorney to execute the same was
 to the plaintiff & the plaintiff, and is not the plaintiff here.
 However in the power to contract the plaintiff is not the
 Mutual Realty Inc., a corporation, the plaintiff plaintiff, and
 a power to contract must be strictly construed, and a
 doctrine from the authority contained will render the plaintiff void.
Kear v. Kear, 238 Ill. 11. and in Kear v. Kear, 234 Ill. 11. 114.
 it was said that where the warrant appellee a particular person in
 whose favor the judgment may be taken, it cannot be taken in favor
 of any other person. This case also holds that where no specific
 person is designated as beneficiary it becomes a matter of construction
 to ascertain who is meant. That is not the case here, and the
 beneficiary is specifically named, and the court properly vacated and
 set aside the judgment.

For the reasons indicated the order of the municipal court is
 affirmed.

RECORDED

Notariff and O'Connor, U.S. Circuit.

39770

GUSTAV SCHUMANN,
Appellee,

vs.

BENJAMIN BOSLEY et al.,
Defendants.

KAREN E. WALSH, not individually
but as successor to Union Bank of
Chicago, as Trustee under Trust
Agreement dated June 1, 1926, and
known as Trust 1303,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

298 I.A. 619²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant and counterclaimant Walsh from a decree granting foreclosure of a trust deed and dismissing his counterclaim for want of equity. The cause was heard on exceptions to the report of a Master. There is no dispute as to the amount due or the defaults under the trust deed. The only question in the case concerns the demand set up by the answer and counterclaim, that defendants are entitled to releases of 18 acres of land containing 213 lots, and that these lots should not be sold under the decree. This question requires a construction of the following covenant in the trust deed: "The grantor herein, his heirs, administrators, successors and assigns, may subdivide said premises, or any part thereof, and shall be entitled to a release from time to time of the lien of this trust deed and the indebtedness hereby secured in not less than one-acre units, upon the payment of Fifteen Hundred Dollars (\$1500) per acre, which shall be applied upon the first maturing notes hereby secured."

As already stated, the facts are not in dispute. The trust deed was executed September 16, 1925, by Benjamin Bosley to secure his notes in the sum of \$40,000 given as part of the consideration for the purchase price of the premises conveyed to him by Schumann.

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The premises were not then subdivided but the trust deed granted to the purchaser or his assigns the right so to do. There were two tracts which were afterward subdivided into two subdivisions and the lots put on the market by the Union Bank of Chicago, to which Bosley conveyed before maturity of the first note subject to the mortgage which the grantee did not assume or promise to pay. Payments in part were made from time to time out of the proceeds of lots sold. The time of payment was twice extended. At the time the bill to foreclose was filed February 4, 1933, the principal debt had been reduced from \$40,000 to \$2376.33. Prior to September 16, 1923, the date of first maturity, \$25,500 was paid; during the period of extension \$11,200 was paid; and after the expiration of the period of extension and prior to the filing of the bill \$1423.67 was paid - a total of \$37,133.66, leaving a balance of \$2376.33 due on the principal with accrued interest. At times payments were made after maturity of the principal obligation; releases were not demanded or given. No request for releases on account of such payments was made until after the bill was filed.

In September, 1935, Walsh, who had become successor trustee to the Union Trust and Savings Bank of Chicago, made a written demand for the release of these 213 lots. It is not denied that the amount paid would entitle defendant to releases as requested and to the extent demanded, but plaintiff says that because of the failure of defendant and his predecessor to demand these releases at the time or times payments were made, or at least before defaults in payment of the indebtedness and other covenants, the privilege was lost. Authorities are cited, all of which are distinguishable. Hall v. Wilson, 277 Ill. App., 601-06, where the covenant to release was held to be ambiguous and uncertain and the demand under all the circumstances characterized as unconscionable. Commercial Bank of Iron Mountain v. Hiller, 106 Mich., 118, 63 N.W.

1912, where demand made under one paragraph of the covenant to release, which provided for releases unconditionally, was sustained while the demand under another paragraph, which promised release upon payment of \$150 a lot, was disallowed because defendant was in default and because no demand was made at the time of payment. The court, construing the language of the covenant, said it was the intention of the parties that the payments should be made and the releases delivered concurrently. The court also said the payments made after default were such as defendant was required to make irrespective of the promise to deliver releases. Reed v. Jones, 133 Mass., 116-20, and Harris Realty Co. v. Epstein, 266 Mass., 366, 369, where the covenant to release was held not to be a separate and independent covenant and defendant made defaults of a nature which made the delivery of releases inequitable. Pierce v. Kneeland, 16 Wis., 672, 84 Am. Dec. 726-27, where the covenant was held to be purely personal in its nature and not assignable to the party who made the demand for releases. Directly to the contrary defendant cites Vawter v. Crafts, 41 Minn., 14, 42 N.W. 483, holding a covenant of this kind runs with the land. The Vawter case is cited with approval by this court in Turner V. Schuh, 297 Ill. App. 317. The opinion in that case by Mr. Justice O'Connor reviewed the authorities and said:

"In Vawter v. Crafts, above cited, the Supreme Court of Minnesota held that where a mortgage was given on a tract of land to secure the payment of moneys at certain dates, as provided in an agreement that the mortgagor would plat the lands and that the mortgagee would release any of the lots when thus platted upon payment of a specified sum for each lot, the right to a release was not terminated by default in the payment of the sum secured by the mortgage, but continued in force until the mortgagee had fully executed the power of sale of the mortgaged premises. It was there further held that the covenant as to partial releases of the land ran and inured to the benefit of the grantee of the mortgagor who purchased one of the lots. The court in speaking of the provision for partial release said (p.16): 'This provision was manifestly inserted in the mortgage with reference to the sale of these lots, when platted, to different parties and to facilitate such sales. *****

"It is claimed, however, that this agreement to give re-

1917, that James was not in the country at the time of the release, which provided for release immediately, and provided while the bonds were being arranged, which provided for the upon payment of \$100 a lot, was distributed between the in default and because no bond was made at the time of payment. The court, concluding the facts in the case, held in the the intention of the parties that the obligation should be made and the release delivered on delivery. The court also held that payments and other debts were made or to be made and the parties make a representative of the parties in the case. See James, 135 Conn., 111-12, 113-114, 115-116, 117-118, 119-120, 121-122, 123-124, 125-126, 127-128, 129-130, 131-132, 133-134, 135-136, 137-138, 139-140, 141-142, 143-144, 145-146, 147-148, 149-150, 151-152, 153-154, 155-156, 157-158, 159-160, 161-162, 163-164, 165-166, 167-168, 169-170, 171-172, 173-174, 175-176, 177-178, 179-180, 181-182, 183-184, 185-186, 187-188, 189-190, 191-192, 193-194, 195-196, 197-198, 199-200, 201-202, 203-204, 205-206, 207-208, 209-210, 211-212, 213-214, 215-216, 217-218, 219-220, 221-222, 223-224, 225-226, 227-228, 229-230, 231-232, 233-234, 235-236, 237-238, 239-240, 241-242, 243-244, 245-246, 247-248, 249-250, 251-252, 253-254, 255-256, 257-258, 259-260, 261-262, 263-264, 265-266, 267-268, 269-270, 271-272, 273-274, 275-276, 277-278, 279-280, 281-282, 283-284, 285-286, 287-288, 289-290, 291-292, 293-294, 295-296, 297-298, 299-300, 301-302, 303-304, 305-306, 307-308, 309-310, 311-312, 313-314, 315-316, 317-318, 319-320, 321-322, 323-324, 325-326, 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1903-1904, 1905-1906, 1907-1908, 1909-1910, 1911-1912, 1913-1914, 1915-1916, 1917-1918, 1919-1920, 1921-1922, 1923-1924, 1925-1926, 1927-1928, 1929-1930, 1931-1932, 1933-1934, 1935-1936, 1937-1938, 1939-1940, 1941-1942, 1943-1944, 1945-1946, 1947-1948, 1949-1950, 1951-1952, 1953-1954, 1955-1956, 1957-1958, 1959-1960, 1961-1962, 1963-1964, 1965-1966, 1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2

leases is conditioned upon performance by the mortgagors of all the covenants and conditions of the mortgage, and that, as default had been made in these, the right to demand a partial release no longer existed. There is certainly no express provision to this effect. By its terms the covenant is unconditional. ***

"Construing this covenant in connection with the other provisions of the mortgage, and in the light of the manifest purpose which it was designed to subserve, we are of the opinion that the right to partial release upon the stipulated terms continues until the mortgage has been fully executed by sale of the mortgaged premises. (See also Clark v. Fontain, 135 Mass. 464, same case, 144 Mass. 287.) * * * *

"This has been the ruling of our Supreme court in Lane v. Allen, 162 Ill., 426, and Williams v. Spitzer, 203 Ill., 505."

It is apparent that the intention of the parties as manifested in the language of the covenant must control. Whether the particular covenant is independent and separable from the other provisions of the trust deed is manifestly important. This covenant is independent, separable, unambiguous and unconditional except as to payments. While in some respects distinguishable other cases holding the law to be as stated in Turner v. Schuh, are Park Investment and Development Co. v. Vanderzee Bros. Bldg. Co. et al., 119 N. J. Eq. 1, 180 A. 838; Dearing Harvester Co. v. Smith, 146 La., 302, 83 So. 530; Cook v. Leslie, 59 S. W. (2nd) 302; Whipple v. Lee, 58 Wash. 253, 108 Pac. 601; Reilly v. City Dept. Ex. & Tr. Co., 322 Pa., 577, 185 A. 620. Plaintiff contends the subdividers made large profits. This, if true, is unimportant. Turner v. Schuh is decisive of this appeal.

We hold defendant was entitled to the releases demanded. The court erred in decreeing foreclosure against these lots and in dismissing defendants' counterclaim.

The decree is reversed and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

McSurely, P. J. and O'Connor, J., concur.

40007

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendants in Error,

v.

LEO M. TARPEY, EDWARD FEELEY
and FRANCES FEELEY,

Plaintiffs in Error.

Error to the

Criminal Court of

Cook County.

298 I.A. 619³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

I. At the February Term, 1937, Leo M. Tarpey, Edward Feeley (known as James Martin), Frances Feeley, James Valentine, Catherine Valentine and George L. West were indicted for conspiracy in that on October 9, 1936, they by false pretenses obtained money from the Surface Lines as compensation for pretended injuries. West and the Valentines testified for the State after pleading guilty. The Valentines were sentenced each to serve one day in jail. West was given eight days.

The Feeleys and Tarpey entered pleas of not guilty. There was a trial by jury and a verdict of guilty. A motion for a new trial was overruled. Edward Feeley and Tarpey were each sentenced to pay a fine of \$1.00 and to be confined in the County Jail for one year. Frances Feeley was fined \$1.00 and given a jail sentence of three months.

Tarpey has been a practicing lawyer in Chicago for nineteen years. He is thirty-nine years of age, married and lives with his family. He is a graduate of DePaul University Law School. Prior to practicing on his own account he was employed by the Hartford Insurance Company and the Illinois Automobile Company. Hitherto no charge of misconduct has been made against him. Fellow

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendants in Error,

v.

LEO M. TARPEY, EDWARD WEELEY
and FRANCIS WEELEY,

Plaintiffs in Error.

Error to the

Original Court of

Cook County.

2281 A. 619

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

I. At the February Term, 1937, Leo M. Tarpey, Edward Weeley (known as James Martin), Francis Weeley, James Valentine, Catherine Valentine and George L. West were indicted for conspiracy in that on October 9, 1936, they by false pretenses obtained money from the Grice Lines as compensation for pretended injuries. West and the Valentines testified for the State after pleading guilty. The Valentines were sentenced each to serve one day in jail. West was given eight days.

The Weeleys and Tarpey entered pleas of not guilty. There was a trial by jury and a verdict of guilty. A motion for a new trial was overruled. Edward Weeley and Tarpey were each sentenced to pay a fine of \$1.00 and to be confined in the County Jail for one year. Francis Weeley was fined \$1.00 and given a jail sentence of three months.

Tarpey has been a practicing lawyer in Chicago for nineteen years. He is thirty-nine years of age, married and lives with his family. He is a graduate of DePaul University Law School. Prior to practicing on his own account he was employed by the Hartford Insurance Company and the Illinois Automobile Company. With reference to no charge of misconduct has been made against him. Below

lawyers, neighbors, business men, former public officials and clergymen testify he bears a good reputation for honesty and integrity. Tarpey testified denying every charge of misconduct made against him. Edward Feeley did not testify.

II. The principal witness for the State was George L. West, disclosed to be guilty of this and many other offenses. West is fifty years of age. He was born in Indiana, lived there for many years, and at one time held the office of deputy sheriff. He was found guilty of an offense against the Prohibition Law and served 60 days on the Indiana penal farm. He was indicted in Indiana on a charge of falsely impersonating a Federal officer but never tried. Witnesses from Indiana (uncontradicted) testify that his reputation there for truth and veracity is bad, and that they would not believe him under oath. He came from Indiana into Illinois where for five years he was employed by the National Life and Accident Company of Nashville, Tennessee, then doing business in this state. In 1927 it was discovered he had defrauded his employer in about 100 cases by means of false claims for sickness and accident, on which he had collected money for others but appropriated to his own use by forging the names of payees of checks. He was indicted in Cook County for confidence game, pleaded guilty and was placed on probation. The defense sought to put this indictment in evidence to show that the conviction was for an infamous offense, but it was excluded. In May, 1933, West was employed by Tarpey as an investigator. Tarpey's law practice consisted largely of claims for personal injuries. West testified that at the time of his employment Tarpey knew of his former fraudulent conduct in Illinois but took him upon his representation of reformation. Tarpey denies such knowledge. When West was first employed by Tarpey, Tarpey's office was at 1 N. LaSalle Street with 7 or 8 other lawyers. Later, another office was rented at 6 N. Clark Street, where West's name

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was put on the door as an adjuster. Afterwards, the law office of Tarpey and his associates was moved from 1 N. LaSalle Street to 10 S. LaSalle Street. It was the custom of West every morning to go to the law office at 10 S. LaSalle Street before going to the office at 6 N. Clark Street. West continued to work for Tarpey until December, 1936, when his connection with the fraudulent claims against the Surface Lines was disclosed. He left the state, stopped at various hotels in Michigan under an assumed name, and late in December was arrested at Kalamazoo, Michigan, and brought back to Chicago. He made his peace quickly; was not sent to jail, but kept in the Administration Building connected with it; frequently consulted with the Assistant State's Attorney, and after serving 8 days was released. Citizens of Illinois (like those in Indiana) testify his reputation for truth and veracity is bad and that they would not believe him under oath. There is no evidence to the contrary.

III. In the selection of a jury the question of a proper statement of the law of Illinois as to the weight to be given to the testimony of an accomplice came up. The court produced an instruction which the parties agreed was an accurate statement of the law. Prior to their selection this instruction was read to the prospective jurors by the court. It appears among the instructions given by the court at the conclusion of the testimony, but it is agreed that unlike other instructions, it was not read to the jury at the time the case was submitted. Defendants argue this is error which requires a reversal of the judgment as to each and all of them.

Upon the motion for a new trial the State produced an affidavit signed by the jurors that while considering the case this instruction was read by them and given consideration. The defendants argue that the reading of the instruction is an integral element of trial by jury; that the failure of the court to read an instruction

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has a tendency to minimize the importance of it, and that the jurors (since the trial lasted three weeks) might well have supposed the court had formed an opinion that the instruction was unimportant and inapplicable. Defendants cite a number of cases which they argue are important as bearing on this question. One of these is Chicago & Alton R.R. Co. v. Robbins, 159 Ill. 598, where in a civil case a jury after it had retired sent a communication to the judge asking whether damages should be fixed up to the time of the commencement of the suit or the then present time, and the judge wrote upon the communication "up to the present time" and sent it back to the jury without recalling the jury into open court and reading the instruction to them. The Supreme Court said in substance that the mere failure to mark an instruction delivered to the jury as given was not ground for reversal, but that the serious matter was that the jury were not brought into open court and the informal instruction publicly read and given to them there. The judgment was reversed. In a case somewhat similar the same result was reached in Sargent v. Roberts, 1 Pick. (Mass.) 337. It was argued the action of the court in these cases in sending the written instruction to the jury room after the jury had retired was in substance equivalent to what happened here. It is said the situation here is more prejudicial because in the Robbins case the jury knew the court's communication was intended as an instruction which was not known in the instant case. Defendants also cite People v. Beck, 305 Ill. 593, where the trial judge in response to a note from the jury asking for instructions gave the same in writing in the absence of defendant through his counsel and the judgment was reversed.

They also cite Duffin v. People, 107 Ill. 113-122; State v. Murphy, 97 So. 397, and call our attention to People v. Fox, 269

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Ill. 300, where the Supreme Court said in substance no error of this kind "can be overlooked or disregarded unless it is clear that the error could not have affected the verdict of the jury. Any other rule would be destructive of the system of trial by jury. ***"

We think the reading of instructions to the jury is an integral part of trial by jury as it exists in this state. Nevertheless, under the facts as disclosed here, we hold there was no reversible error. The error was merely technical. The record shows another instruction on the same point was requested by the defendant and marked "refused" by the court. It is apparent that this instruction given but not read was substituted in lieu of the instruction requested by defendants. It is not argued that it was error to refuse the instruction requested. It was the duty of the court to read the instruction to the jury. It is apparent the failure to read it was by mere inadvertence. The record shows the defendants and their counsel were present in court. They made no complaint the instruction was not read. They knew that the instruction requested had been refused. They made no suggestion. At common law it was the practice to instruct orally and the attorneys at the same time made suggestions as to modification of instructions given or requests for further instructions. We hold it was the duty of counsel to call attention of the court to the fact that the instruction had not been read. The record indicates this inadvertence came to the attention of counsel for the defendants before the jury finally separated and after the verdict was returned. They made no suggestion at any time until later, when it was urged as grounds for a new trial. The inadvertence of the court was one for which defendants are in part responsible. The failure to read the instruction was a technical error but not under the circumstances reversible.

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IV. The defendants contend the court erred in allowing the State to put in evidence certain proofs tending to show similar offenses at other times. The indictment charged defendants conspired on October 9, 1936, to obtain money from the Surface Lines for injuries falsely claimed to have been sustained in a collision between a car of the Surface Lines and a motor truck which occurred on August 31, 1936, at the corner of Fillmore and Kedzie Streets in the City of Chicago. Upon the trial, over the objection of Tarpey, the court permitted evidence with reference to two other accidents. First evidence was introduced tending to show that in August, 1935, a street car of the Surface Lines ran into a bridge abutment at the intersection of Greenwood Avenue and 75th Street. West testified that defendant, Edward Feeley, under the name of Edward Foley, came into the office of Tarpey at 6 North Clark St. on the day of and after this accident; that West made a contract with him by which he employed Tarpey to prosecute his claim; that an attorney's lien was made out and sent to the Surface Lines; that on the following day Feeley, under the name of Foley, went with West to the office of the Surface Lines where the claim was settled for \$75; that Tarpey received a fee and released his lien. A motion in Tarpey's behalf to strike this evidence was denied.

The State also introduced evidence tending to show that on May 11, 1936, a collision occurred between the street cars of the Surface Lines at the corner of Dearborn and Adams Streets. West testified that he was in his office at 6 North Clark Street with defendant, Edward Feeley, and others when this accident was reported by one O'Donnell. West says Feeley wrote out the facts as given by O'Donnell and said he was going to put Henry Foran and Clara Foran into that case. to which West replied that he did not know the Forans but it was all right with him. West further says that on the afternoon of the same day Frances Feeley called him on

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the phone and said she would take the place of Clara Foran; that she would "go in that and be the wife of Henry Foran". Thereafter West says he called on Henry Foran and Frances Feeley and took their statements. He also obtained contracts signed by them employing Tarpey to represent them on account of the supposed injuries received in that accident. West also says he took the statement to Tarpey's office. He says he told Tarpey that Clara Foran was Frances Feeley and that Henry Foran was using his mother's address so that he could not be checked up and his place of employment ascertained. Tarpey denied that West said these things to him. Claims for liens were sent out from Tarpey's office. West undertook to negotiate a settlement of these claims with Mr. Mahoney of the Surface Lines and the settlement was made on June 6, 1936, for \$300. West also said that Frances Feeley and Henry Foran came to the office at 6 North Clark Street to get their checks; that he took them to 10 South La Salle Street and that just as he was going into Tarpey's office Tarpey came out and told him to wait in the reception room, and not to bring these people into his office; that he then sent them back to the office at 6 North Clark Street and that Tarpey later wrote out checks distributing to them the proceeds of their claims.

It is admitted that the testimony of West as to the accident of May 11, 1936, makes out a prima facie case against him and the two Feeleys, but it is earnestly contended that his testimony (assuming it to be true) comes far from showing the guilt of Tarpey by clear and satisfactory evidence. Tarpey, it is argued, from the alleged conversation with West would know that Frances Feeley was using another name and the request to take the claimants to another might justify an inference that Tarpey did not care to have them in his office. But this, it is urged, comes far from showing actual knowledge and actual conspiracy on his part.

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It is admitted that the testimony of West as to the accident of May 11, 1936, makes out a prima facie case against him and the two Feeleys, but it is earnestly contended that his testimony (assuming it to be true) comes far from showing the guilt of Tarpey by clear and satisfactory evidence. Tarpey, it is argued, from the alleged conversation with West would know that Frances Feeley was using another name and the request to take the claimants to another might justify an inference that Tarpey did not care to have them in his office. But this, it is urged, comes far from showing actual knowledge and actual conspiracy on his part.

In Illinois, evidence of other similar offenses is admitted in certain cases and under certain circumstances not to prove the guilt of defendant of the crime charged but for the limited purpose of showing an actual corrupt intent. For this purpose, evidence of this kind has been held admissible in cases of embezzlement, Schintz v. People, 178 Ill. 320; of forgery People v. Ernst, 306 Ill. 452; of murder by abortion, People v. Hagenow, 236 Ill. 514; and of conspiracy, People v. Pouchot, 174 Ill. App. 1; People v. Warfield, 261 Ill. 293. It is also admissible in counterfeiting and some other cases. Lipsey v. People, 227 Ill. 364.

In ruling on the admissibility of such evidence two preliminary questions arise. First, as to the degree of proof required to establish the alleged similar offense, and secondly, whether its connection with the offense charged is so close as to make it competent. In some states it is held that the fact of such similar offense must be established through proof beyond a reasonable doubt. Other states require less degree of proof. The cases are collected in an annotation to Haley v. State, 209 S.W. 675; 3 A.L.R. 779. Illinois does not require the similar offense to be established by proof convincing beyond a reasonable doubt. People v. Dougherty, 266 Ill. 420-25. Indeed, the rule applicable does not seem to have been laid down definitely but it has been held that "strict proof" must be made. People v. Ernst, 306 Ill. 452. In so far as Tarpey is concerned and with reference to the alleged offense based on the accident of August, 1935, the preliminary proof was not sufficient to meet the required test. There is no competent proof that Tarpey had knowledge of that supposed offense or took part in it, nor, indeed, did West succeed in proving himself guilty of that supposed offense. There was no evidence tending to show by "strict proof" that the claim there made was in

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fact fictitious. Klasen, the conductor, testified that there were about 70 passengers on the car; that he handed out witness cards and that when he looked over the cards received he did not have any card from Frances Feeley or Edward Foley, and that neither of these reported to him that they were hurt. Mr. Fishher, adjuster for the Surface Lines, testified that he settled the claim of Frances Feeley for this accident personally, paid the money directly to her and that so far as he knew "Lou Tarpey" had nothing to do with it. The court on motion of defendants struck out evidence as to Frances Feeley but denied the motion to strike it out as to Foley. In People v. Pouchot, 174 Ill. App. 1, the Appellate Court said that evidence of this kind "should have been limited in each particular instance to the parties concerned therein, if so requested by the party not concerned. These particular acts were not acts in furtherance of the common design or conspiracy charged, and were therefore not legal evidence against the other party taking no part therein.***" We hold the admission of this evidence against Tarpey and the denial of his motion to strike it out was reversible error because the evidence did not show by strict proof that he participated in this offense, and also because the evidence was not (except in a remote way) connected with the alleged offense for which he was on trial. People v. Molineux, 168 N.Y. 264; 61 N.E. 286; 62 L.R.A. 193.

V. There was error in rulings in connection with the cross-examination of the witness, Helen Berg. Miss Berg formerly acted as secretary for Tarpey. She was called as a witness by the State and gave testimony tending to discredit some of the statements of West. On redirect the State's Attorney asked whether Drake H. Berg was her brother. She replied he was. The State's Attorney then asked whether her brother was under indictment. The defendants objected and made a motion to withdraw a juror. The motions were denied. The State's Attorney then stated that the brother of the

fact fictitious. Kissen, the conductor, testified that there were about 70 passengers on the car; that he handed out witness cards and that when he looked over the cards received he did not have any card from Frances Feeley or Edward Feeley, and that neither of these reported to him that they were hurt. Mr. Rinkner, adjudge for the defense, testified that he settled the claim of Frances Feeley for this accident personally, paid the money directly to her and that so far as he knew "Don Tarpey" had nothing to do with it. The court on motion of defendants struck out evidence as to Frances Feeley but denied the motion to strike it out as to Tarpey. In People v. Bonopot, 174 Ill. App. 1, the Appellate Court said that evidence of this kind "should have been limited in each particular instance to the parties concerned therein, it so requested by the party not concerned. These particular acts were not acts in furtherance of the common design or conspiracy charged, and were therefore not legal evidence against the other party taking no part therein." We hold the admission of this evidence against Tarpey and the denial of his motion to strike it out was reversible error because the evidence did not show by strict proof that he participated in this offense, and also because the evidence was not (except in a remote way) connected with the alleged offense for which he was on trial. People v. Solinew, 168 N.Y. 284; 61 N.E. 236; 62 N.W.A. 193.

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witness was under indictment and the court observed that it was not, however, under this indictment. Further objections were made when the court inquired of one of the attorneys "Have you put in an appearance for him?" An exception was taken but not allowed. Counsel for defendants then asked leave to make motions out of the presence of the jury. The request was denied. Motions were then made in the presence of the jury to exclude this testimony, and to strike the remark of the court. The motions were overruled. There was error in these rulings. The absence of the brother had been established. The witness had said that she did not know where Berg was. She was a witness for the State. The State could not impeach her. Moreover, the mere fact that an indictment had been returned against Berg would not be evidence against him and certainly not evidence tending to discredit the witness. People v. Newman, 261 Ill. 11; People v. Herbert, 361 Ill. 64; People v. Brothers, 347 Ill. 530.

VI. Again there was error in permitting the impeachment of the defense witness, Richard J. Kruse, who identified West as the defendant in certain legal proceedings in Indiana. Over objection the State was permitted to ask the witness whether he had been indicted. The mere fact of an indictment was not admissible for the purpose of impeaching the witness. The question should not have been permitted. The State was further permitted to ask whether the witness had been employed by the Indiana penitentiary at the time Dillinger escaped. This question was highly improper and ought not to have been asked. No evidence was offered tending to show that the witness had been convicted under any indictment or that the crime for which he was indicted was an infamous offense.

VII There is less of merit in the defendants' contention that the courts erred in refusing to permit them to lay the foundation for the impeachment of witnesses by showing prior inconsistent statements and by permitting impeachment of the prospective

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witnesses to whom the statements had been made by showing conviction of a misdemeanor. On cross-examination West was questioned at length as to whether he had not made several statements inconsistent with his testimony to one, Summerville. West said that he had spoken to Summerville on the 5th floor of the Administration Bldg. of the County Jail. He was asked whether while in the Administration Bldg. he had lunches with Summerville; whether he had told Summerville that Mahoney of the Surface Lines gave him a jar of jelly; whether he (West) said he bought the jelly through a police officer; whether he had told Summerville to go up and see Tarpey and tell him if he would send him \$1500 he would tell the truth "which will throw him out"; whether Summerville said to him, "What is the matter with you, why are you putting all these people in trouble who picked you up when you didn't have a dime and made a man out of you and fed you for the last couple of years, and now you are telling all these things about them"; whether he had said the State had the goods on him and that his only way out was by rapping the lawyers; whether he had told him that if he (Summerville) would go along with him (West) it would help him (West) out of trouble. To all these questions the witness replied in the negative. Upon redirect examination the court allowed West, over objection, to state in detail the whole conversation with Summerville. It is now objected that this should not have been permitted. As a matter of fact, Summerville was never produced as a witness, nor his absence explained, which must have gone very far, we think, in discrediting defendants' case in the eyes of the jury. While the evidence would have been objectionable ordinarily, defendants opened up the way for the introduction of it by this cross-examination, which in some aspects seems to have taken on characteristics of "trial by battle". Defendants cannot obtain a reversal on account of evidence for the introduction of

witnesses to whom the statements had been made by allowing conviction of a misdemeanor. On cross-examination West was questioned at length as to whether he had not made several statements inconsistent with his testimony to one, Sumnerville. West said that he had spoken to Sumnerville on the 5th floor of the Administration Bldg. of the County Jail. He was asked whether while in the Administration Bldg. he had lunches with Sumnerville; whether he had told Sumnerville that Mahoney of the Surface Lines gave him a jar of jelly; whether he (West) said he bought the jelly through a police officer; whether he had told Sumnerville to go up and see Tarpy and tell him if he would send him \$1500 he would tell the truth "which will throw him out"; whether Sumnerville said to him, "What is the matter with you, why are you putting all these people in trouble who picked you up when you didn't have a dime and made a man out of you and led you for the last couple of years, and now you are telling all these things about them"; whether he had said the State had the goods on him and that his only way out was by repaying the lawyers; whether he had told him that if he (Sumnerville) would go along with him (West) it would help him (West) out of trouble. To all these questions the witness replied in the negative. Upon redirect examination the court allowed West, over objection, to state in detail the whole conversation with Sumnerville. It is now objected that this should not have been permitted. As a matter of fact, Sumnerville was never produced as a witness, nor his absence explained, which must have gone very far, we think, in discrediting defendants' case in the eyes of the jury. While the evidence would have been objectionable ordinarily, defendants opened up the way for the introduction of it by this cross-examination, which in some respects seems to have taken on characteristics of "trial by battle". Defendants cannot obtain a reversal on account of evidence for the introduction of

which they opened the way. Wharton's Crim. Evid. (11th ed.) Vol.3, p. 2177.

VIII. It is next contended that the court erred in not allowing defendants to prove that West had been convicted of an infamous crime. For the purpose of impeachment the defendants put a deputy clerk of the Criminal Court on the stand and asked him to produce the indictment on which West was tried for confidence game and defrauding the insurance company. The indictment was produced and defendants offered it in evidence. West had admitted his conviction and said he did not know whether it was for conspiracy or larceny. The record of the judgment rather than the indictment would show for what offense he was actually convicted. There was no error in excluding the indictment. West's admissions in this respect were sufficient to discredit him with the jury in so far as it was possible to discredit him that way.

IX. The defendants complain that in more than twenty instances the State's Attorney intentionally prejudiced the defendants by the insinuation of irrelevant or incompetent matters. These are recited and argued at length. It is also argued that 18 distinct and serious prejudicial errors were committed by the trial judge in remarks made and in his rulings or in his conduct. The record is voluminous. The trial was of several defendants and involved complicated matters extending over many years. It is the unquestioned rule in this state that while a conviction may be had on the uncorroborated testimony of an accomplice such conviction will not be sustained unless the record is substantially free from prejudicial error. It is apparent from what has been already said that the judgment in this case must be reversed. A lengthy discussion of these further assignments of error would serve no useful purpose but unduly extend the opinion. We have already seen that while error was committed, defendants are not altogether blameless.

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while error was committed, defendants are not altogether blameless.

The injection of proofs of supposed similar offenses served only to make a complicated case more complicated and to make the trial difficult both for court and counsel. The attitude of the State's Attorney throughout the trial was subject to criticism in that there was at all times an effort to discredit by means of insinuation and epithet. Illustrative, there was in the cross-examination an attempt to create the impression that defendant Tarpey was in the habit of having forgeries committed in connection with claims in his office and of withholding from claimants the amount due to them, which there is absolutely no competent evidence in the record tending to show to be facts and which was entirely immaterial.

We shall not discuss the weight of the evidence as there must be another trial. It is the well settled law of this State that a conviction on the uncorroborated testimony of an accomplice will not be sustained unless the record is substantially free from prejudicial error. People v. Lewis, 313 Ill. 312, 319; People v. Johnson, 317 Ill. 430, 435; People v. Gordon, 344 Ill. 422, 434; People v. Lawson, 345 Ill. 428, 432; People v. Weitzman, 362 Ill. 11, 23; People v. Gleitsmann, 361 Ill. 165, 171; People V. Barry, 287 Ill. App. 12, 41. This record is not substantially free from error and the judgment must therefore be reversed and remanded.

REVERSED AND REMANDED.

McSurely, P.J., and O'Connor, J., concur.

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REVERSED AND REMANDED.

McNulty, P.J., and O'Connor, J., concur.

40202

ELWOOD L. WILLIAMS,

Appellant,

vs.

MAX WITKOWER,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

298 I.A. 620'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action by Williams, plaintiff, for money claimed to be due as commissions for obtaining a tenant at the request of defendant Witkower, there was a trial by jury, a motion by plaintiff at the close of all the evidence for a directed verdict (which was denied), a verdict for defendant, motions by plaintiff for a new trial and for judgment non obstante veredicto (which were denied) and judgment entered for defendant. Plaintiff appealing contends that on the undisputed evidence, as a matter of law he is entitled to recover the sum of \$3700 for which amount judgment should be entered in this court. Defendant argues that plaintiff is not entitled to recover. He concedes that if, as a matter of law, plaintiff is so entitled the sum of \$3700 is correct.

The undisputed evidence tends to show plaintiff and defendant prior to this controversy had been friends in a business and social way for 40 years. Plaintiff is a licensed real estate broker with offices in Evanston where both the parties live. Defendant is the owner of several tracts of real estate, among which are premises known as 615 Davis Street, which are improved by a building four stories high. These premises in 1915-1916 were used as a

40000

ALWOOD R. WILLIAMS,

Appellant,

vs.

MAX WITKOWSKI,

Appellee.

FILED IN COURT

1915

39 A. 680

R. JUSTICE WITKOWSKI DELIVERED THE OPINION OF THE COURT.

In an action by Williams, Plaintiff, for money claimed to be due as commissions for obtaining a patent at the request of defendant Witkowski, there was a trial by jury, a motion by plaintiff at the close of all the evidence for a directed verdict (which was denied), a verdict for defendant, motions by plaintiff for a new trial and for judgment notwithstanding the verdict (which were denied) and judgment entered for defendant. Plaintiff appealing contends that on the undisputed evidence, and that it is entitled to recover the sum of \$3700 for which amount judgment should be entered in this court. Defendant argues that plaintiff is not entitled to recover. He contends that it, as a matter of law, plaintiff is so entitled the sum of \$3700 is correct.

The undisputed evidence tends to show plaintiff and defendant prior to this controversy had been friends in a business and social way for 40 years. Plaintiff is a licensed real estate broker with offices in Evanston where both the parties live. Defendant is the owner of several tracts of real estate, among which are premises known as 615 Davis Street, which are improved by a building four stories high. These premises in 1913-1914 were used as

theatre but at the time these negotiations were begun in November, 1934, were occupied by Lyon & Healy for other purposes. In November, 1934, defendant requested plaintiff to find a tenant for the property which he said he thought would be available in March or April, 1935. Defendant told plaintiff he wished the premises to be used for theatrical purposes, and that he would be willing to give a tenant using it for this purpose a long-time lease with a rental of about \$8,000 per year, alterations in the construction of the building to be paid for by the tenant and the tenant to furnish heat for the building. The theatre would occupy the first floor. Defendant also told plaintiff that he would wish the tenant to deposit securities against mechanic's liens. These matters were talked over from time to time and plaintiff began a search for such a tenant. Nothing was then said about the commission to be paid but defendant said he knew what the usual charges were. The question of obtaining a permit for the operation of the proposed theatre was not (so far as the evidence disclosed) mentioned at this time.

In December, 1934, defendant went to Florida. He and plaintiff continued to communicate with each other about the matter by telegram and telephone. Plaintiff found a group interested in the theatrical business composed of Mr. Solomon and persons associated with him, who proposed to take a lease and to that end caused the Davis Street Theatre Company, a corporation, to be incorporated. A proposition that they would rent the premises for a period of 25 years, beginning with the payment of \$550 a month, then \$650, \$750, \$850 and \$950, with changes every 5 years was made, communicated to defendant in Florida and accepted by him. Defendant returned from Florida in the latter part of March, and on April 2, 1935, met with the proposed lessees at the office of his attorneys for the purpose of entering into a written lease.

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The attorneys for defendant produced such a lease in writing which was accepted by the corporation (the proposed tenant) and executed by it. At the same time a check to the order of defendant for one month's rent was given by the proposed tenant to defendant's attorney. Defendant refused to sign this lease at that time. He did not object to particular provisions of it. He did not object that the lessee tendered was a corporation rather than an individual. He said he would not sign without consulting his personal attorney, Nicholas Pritzker, who by reason of an injury received in an automobile accident was not then at the office. Here, for the first time, the possibility of obtaining a permit from the City of Evanston to operate the theatre was mentioned. The prospective lessee said he would not care to take a lease unless such permit could be obtained, and defendant said he could obtain this without difficulty. Thereupon, the attorneys for defendant, by Mr. Freeman, drew an escrow agreement which was signed by the parties. This agreement recited that the written lease dated March 30, 1935, was deposited with Mr. Freeman to be held upon terms that "If within fifteen (15) days from the date hereof there is produced and exhibited to the undersigned a permit issued by the Building Department of the City of Evanston permitting the use of the premises demised for theatre purposes, then the undersigned is to deliver one executed copy of said lease to the Davis Street Theatre Corporation, or its attorney, and is to deliver the other executed copy of said lease, together with the check deposited herewith for rent for the first month of said term, to Max Witkower, or his attorney.

(2) If at the expiration of said fifteen (15) days such permit is not produced and exhibited, then at the option of the Davis Street Theatre Corporation (which option is to be exercised by Harry L. Solomon, who is designated as its agent for such purpose) upon his

The attorneys for defendant produced such a lease in writing which was accepted by the corporation (the proposed tenant) and executed by it. At the same time a check for the order of defendant for one month's rent was given by the proposed tenant to defendant's attorney. Defendant refused to sign this lease at that time, but did not object to particular provisions of it. It is not objected that the lease tendered was a corporation rather than an individual. He said he could not sign without consulting his personal attorney, Nicholas Bricker, who by reason of an injury received in an automobile accident was not then at the office. For the first time, the possibility of obtaining a permit from the City of Evanston to operate the theatre was mentioned. The prospective lessee said he would not care to take a lease unless a permit could be obtained, and defendant said he could obtain this permit without difficulty. Thereupon, the attorneys for defendant, by Mr. Freeman drew an escrow agreement which was signed by the parties. This agreement recited that the written lease dated March 31, 1935, was deposited with Mr. Freeman to be kept upon terms that "it within fifteen (15) days from the date hereof there is produced and exhibited to the undersigned a permit issued by the Building Department of the City of Evanston permitting the use of the premises demised for theatre purposes, when the undersigned is to deliver one executed copy of said lease to the Davis Street Theatre Corporation, or its attorney, and is to deliver the other executed copy of said lease, together with the check heretofore deposited for rent for the first month of said term, to said attorney, or his attorney." (2) It is the exhibition of said fifteen (15) days upon which it is not produced and exhibited, then at the option of the Davis Street Theatre Corporation (which option is to be exercised by Harry Solomon, who is designated as its agent for such purposes) upon its

request, one executed copy of said lease is to be delivered to the Davis Street Theatre Corporation, and one executed copy of said lease, together with the check attached thereto, is to be delivered to Max Witkower, or upon his request the said leases are to be cancelled. If the leases are delivered at the request of Harry L. Solomon pursuant to the provisions of this paragraph, they are delivered upon the express understanding and agreement that the premises demised by said leases are taken as is. (3) In any event these leases are to be delivered or cancelled pursuant to the terms hereof by not later than April 17, 1935."

The check for the rent was made by Mr. Solomon, was handed to defendant and by him to Mr. Freeman, by whom the escrow agreement was signed. This lease was never delivered and was never cancelled either by Mr. Solomon or by the Davis Street Theatre Corporation.

The negotiations between the parties continued. They met again at the office of defendant's attorneys on July 24, 1935. In the meantime the attorneys had rewritten the lease. It is in evidence, is dated March 30, 1935, describes defendant as party of the first part and the Davis Street Theatre Corporation as party of the second part and lessee. It consists of 18 articles covering 31 printed pages. It is executed by defendant under his seal and by the corporation by its officers. In substance it demises the premises for a term of 25 years beginning July 1, 1935, and ending June 30, 1960. The rent reserved is for the first 5 years \$6600 per annum; for the next 5 years \$7800 per annum, and for the remainder of the term \$9000 per annum. The lessee agrees to expend not less than \$5000 in remodeling the premises and prior to beginning such work agrees to deposit \$5,000 in escrow as security

request, one executed copy of said lease is to be delivered to the Davis Street Theatre Corporation, and one executed copy of said lease, together with the check attached hereto, is to be delivered to Max Witkower, or upon his request the said leases are to be cancelled. If the leases are delivered to the extent of the provisions of this paragraph, they are delivered upon the express understanding and agreement that the premises desired by said leases are taken as is, (3) in any event these leases are to be delivered or cancelled pursuant to the terms hereof by or later than April 17, 1933.

The check for the rent was made by Mr. Johnson, was handed to defendant and by him to Mr. Freeman, by whom he was agreement was signed. This lease was never delivered and was never cancelled either by Mr. Johnson or by the Davis Street Theatre Corporation.

The negotiations between the parties continued. They met again at the office of defendant's attorneys on July 24, 1933. In the meantime the attorneys had rewritten the lease. It is in evidence, as dated March 30, 1933, describes defendant as party of the first part and the Davis Street Theatre Corporation as party of the second part and lessee. It consists of 13 articles covering 31 printed pages. It is executed by defendant under his seal and by the corporation by its officers. In substance it provides for premises for a term of 25 years beginning July 1, 1933, and ending June 30, 1958. The rent reserved is for the first 5 years \$6000 per annum; for the next 5 years \$7500 per annum, and for the remainder of the term \$9000 per annum. The lessee agrees to expend not less than \$2000 in remodeling the premises and prior to beginning such work agrees to deposit \$5,000 in escrow as security

to defendant against mechanic's liens. Contemporaneously, the parties executed another written memorandum of agreement reciting the execution of the lease under date of March 30, 1935, and stating that the parties have agreed that it is necessary to apply for a mandamus against the municipality of Evanston to procure a permit for construction changes in the premises; that the estimated cost of application will be in excess of \$1,000; that Witkower agrees to pay \$500 for this purpose upon the demand of Harry L. Solomon, but only in the event a writ of mandamus issues. If no writ issues Witkower is not liable on account of costs incident to the application for the writ. The writing provides that the Davis Street Theatre Corporation will defray the remainder of the costs and will be entitled to receive from Witkower credit for the total amount for expenses incurred for this purpose against rents accruing under the terms of the lease, the total not to exceed the sum of \$1250 less the \$500, if paid, to be charged against and credited upon the rent first accruing. "(a) That the Lessee will have a period of not more than Eighty (80) days from the date hereof within which to obtain all necessary permits to operate said demised premises as a theatre. In the event that the Lessee fails or is unable, for any reason whatever, to procure the necessary permits within said period, then and in that event either party hereto has the right to cancel and terminate their lease dated the 30th day of March, 1935, by serving written notice of intention so to do upon the other party, either in person or by registered mail", and that "upon the service of said notice this agreement and said lease shall become null, void and of no further force and effect". Thereafter, a petition for mandamus was filed in the Superior Court and there was judgment that the writ issue. The City of Evanston appealed and no permit was issued within 80 days from July 24, 1935. The time limited expired on October 12.

to defendant as that mechanical's license. Consequently, the parties executed another written agreement of agreement reciting the execution of the lease under date of March 30, 1935, and stating that the parties have agreed that it is necessary to apply for a mandamus against the municipality of Evanston to procure a permit for construction changes in the premises; that the estimated cost of application will be in excess of \$1,000; that Withkover agrees to pay \$500 for this purpose upon the demand of Harry A. Solomon, but only in the event a writ of mandamus is issued. In no writ issues Withkover is not liable on account of costs incident to the application for the writ. The writing provides that the Davis Street Theatre Corporation will delay the remainder of the costs and will be entitled to receive from Withkover or his estate for the total amount for expenses incurred for his purpose against rents accruing under the terms of the lease, the total not to exceed the sum of \$250 less the \$500, if said, to be charged against and credited upon the next first accounting. "(a) That the lessee will have a period of not more than thirty (30) days from the date hereto within which to obtain all necessary permits to operate said leased premises as a theatre. In the event said lessee fails or is unable, for any reason whatever, to procure the necessary permits within said period, then and in that event either party hereto has the right to cancel and terminate their lease dated the 30th day of March, 1935, by serving written notice of intention as to do upon the other party, either in person or by registered mail," and that "upon the service of said notice this agreement and said lease shall become null, void and of no further force and effect". Thereafter, a petition for mandamus was filed in the Superior Court and there was judgment that the writ issue. The City of Evanston appealed and no permit was issued within 60 days from July 24, 1935. The time limited expired on October 12,

The defendant did not take any action until November 22, 1935, when he addressed a letter to the Davis Street Theatre Corporation, giving notice "that the leasing, heretofore entered into between yourself and the undersigned on March 30, 1935, be, and the same is hereby cancelled and declared as null, void and of no further force or effect".

During the entire time of these negotiations the defendant was negotiating with Balaban and Katz for the sale of his entire leasehold interest to them. On cross-examination he said: "I think Balaban & Katz first came into the picture long before your people came in. They were negotiating with me during the time the Davis Street Theatre Corporation was negotiating with me."

On November 22 (the day he gave notice of cancellation) defendant sold his leasehold to Balaban & Katz. No theatre has since been operated on the premises. A question as to whether Balaban & Katz offered more money than the Solomon group and an offer by plaintiff to prove the sale by defendant to Balaban & Katz were objected to by defendant and the objection, we think, erroneously sustained. This error, however, is not argued by plaintiff.

The evidence discloses that thereafter the Davis Street Theatre Corporation filed a complaint against defendant and Balaban & Katz, with others, for the specific performance of the lease of July 24, 1935. An offer of plaintiff to show that this suit was settled by paying complainants \$6,000 was objected to and the objection, as we think, erroneously sustained. Plaintiff, however, does not argue error on this ruling but rests his case upon the contention that, as a matter of law, under the facts as stated he is entitled to recover his commission for two reasons. First, because he produced a tenant who was willing and able to lease upon defendant's terms; and secondly, because the lease of July 24, 1935, was a binding, obligatory contract of leasing with the tenant

The defendant is a party to the lease with Davis Corporation, 1935, when he addressed a letter to the Davis Street Theatre Corporation, giving notice "that the lease, dated the 1st day of January 1935, between yourself and the undersigned on behalf of Davis Corporation, 1935, is hereby cancelled and declared void and of no further force or effect".

During the entire time of these negotiations the defendant was negotiating with Balaban and Katz for the sale of his time leasehold interest to them. On cross-examination he said: "I think Balaban & Katz first came into the picture long before your case came in. They were negotiating with me during the time the Davis Street Theatre Corporation was negotiating with me."

On November 25 (the day he gave notice of cancellation) defendant sold his leasehold to Balaban & Katz. The theatre has since been operated on the premises. A question as to whether Balaban & Katz offered more money than the Solomon group and an offer by plaintiff to prove the sale by defendant to Balaban & Katz were objected to by defendant and the objection, we think, erroneously sustained. This error, however, is not argued by plaintiff.

The evidence discloses that after the Davis Street Theatre Corporation filed a complaint against defendant and Balaban & Katz, with others, for the specific performance of the lease of July 24, 1935. An offer of plaintiff to show that this suit was settled by paying complainants \$8,000 was objected to and the objection, as we think, erroneously sustained. Plaintiff, however, does not argue error on this ruling but rests his case upon the contention that, as a matter of law, under the facts as stated he is entitled to recover his commission for two seasons. First, because he procured a tenant and the selling price was \$100,000 upon defendant's terms; and secondly, because the lease of July 24, 1935, was a binding, obligatory contract of leasing with the tenant

whom he produced at defendant's request.

Plaintiff (rightly we think) argues as a matter of law that under the terms of his employment his commission was earned when defendant (in Florida) accepted the proposition of the prospective tenant and authorized plaintiff to go to N. Pritzker of Pritzker and Pritzker (his own attorneys) and have a lease drawn between him and the prospective tenant according to the terms agreed on. He further contends (correctly we think) that again on April 2, 1935, when the prospective tenant signed the lease as prepared in the office of defendant's attorneys and gave a check for the first month's rent he had for the second time complied with the terms of his employment and earned his commission. The defendant suggests possible issues of fact in that, as it is now said, the tenant was a corporation without a bank account instead of an individual theatre operator as provided by the terms of the employment, and that contrary to the terms of that employment the rent was not to begin on March 15, 1935. The evidence in our opinion does not disclose any issues of fact in these respects. On the contrary, assuming the existence of such condition in the terms of employment, the uncontradicted evidence (documentary and oral) shows a waiver of each and every one of them. As we read the evidence there is no material issue of fact in this case.

The defendant admits that if the agreements of July 24, 1935, "when read together, constitute a mutually, obligatory, binding contract between the defendant and the Davis Street Theatre Corporation, the question of the tenant's readiness, willingness and ability is not involved". Defendant, however, says that the contract made at that time was not mutually obligatory because the party procured by the broker had the option to withdraw and urges that a real estate broker who does no more than procure such a contract is not entitled to commission.

whom he produced as defendant's witness.

Plaintiff (rightly we think) argues as a matter of law that under the terms of his employment as commission agent when defendant (in Florida) accepted the production of the prospective tenant and authorized plaintiff to go to L. B. Bittaker and Bittaker (his own attorneys) and have a lease drawn between him and the prospective tenant according to the terms of the contract. He further contends (correctly we think) that again on March 2, 1935, when the prospective tenant signed the lease as provided in the office of defendant's attorneys and gave a check for the first month's rent he had for the second time complied with the terms of his employment and earned his commission. The defendant suggests possible issues of fact in that, as it is now said, the tenant was a corporation without a bank account instead of an individual theatre operator as provided by the terms of the employment, and that contrary to the terms of that employment the rent was not to begin on March 1, 1935. The evidence in our opinion does not disclose any issues of fact in these respects. On the contrary, assuming the existence of such condition in the terms of employment, the uncontroverted evidence (documentary and oral) shows a waiver of such and every one of them. As we read the evidence there is no material issue of fact in this case. The defendant insists that in the agreement of July 4, 1935, "when read together, constitute a mutually, obligatory, and the contract between the defendant and the Davis Street Theatre Corporation, the question of the tenant's liability, will, here and ability is not involved." Defendant, however, says that the contract made at that time was not mutually obligatory between the party procured by the broker had the option to withdraw and agree that a real estate broker who does so may then procure and a contract is not entitled to commission.

Defendant relies on Lawrence v. Rhodes, 188 Ill. 96, and Mason v. Miller, 179 Ill. App. 347. In the first case, Lawrence employed Rhodes, a broker, to "effect a sale" of premises at a named price per acre. Rhodes produced Gross, a prospective purchaser, with whom Lawrence made a written contract of sale by the terms of which \$1500 was to be paid upon execution of the contract and \$10,500 at the delivery of the deed and the balance in three equal installments. The contract provided that if the purchaser upon tender of the deeds failed to make payment and execute a note and trust deed for further payments the agreement should be null and void and the earnest money paid retained as damages. An abstract of title was furnished but Gross refused to accept. Thereupon, Lawrence returned the \$1500 to avoid litigation and the tying up of the title to his property. The broker recovered for his commission in the trial court, and the Appellate Court affirmed the judgment. Upon appeal by Lawrence the Supreme Court said the question of law was whether plaintiff effected a sale according to the terms of his employment. The court said that plaintiff contended that as soon as the contract was signed a sale was effected and he was entitled to his commission. Such contention, the court said, could not be sustained.

"By the terms of the contract entered into by Gross with appellant, Gross did not purchase the premises and a sale thereof was not thereby effected. By such contract Gross agreed to purchase the premises at \$800 per acre or to forfeit \$1500, it being optional with him whether he would buy or forfeit the \$1500. If he saw fit to forfeit the \$1500, as he had the option to do, no sale was effected and no compensation earned by appellee."

The ground of the decision was that the broker did not effect a sale but only procured an option. The case is distinguishable from the instant case in two respects. First, in that the contract there was that the broker was to "effect a sale" while here

Defendant relies on Lawrence v. Rogers, 131 Ill. 96, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"By the terms of the contract entered into by Gross with appellant, Gross did not purchase the premises and a sale thereof was not thereby effected. By such contract Gross agreed to purchase the premises at \$500 per acre or to forfeit \$1500, it being optional with him whether he would pay or forfeit the \$1500. It was not to forfeit the \$1500, as he had the option to do, no sale was effected and no compensation earned by appellee."

The ground of the decision was that the broker did not effect a sale but only procured an option. The case is distinguished from the instant case in two respects. First, in that the contract there was that the broker was to "effect a sale" while

the undisputed evidence shows only a contract to procure a tenant ready, able and willing to lease the premises on defendant's terms. Secondly, in that case the person who declined to perform was the purchaser (analogous here to the proposed tenant); in this case the party declining to perform was the lessor (analogous to the owner in the Rhodes case). In the Rhodes case the opinion distinguished Wilson v. Mason, 158 Ill. 304, on this ground, saying that the contract was one of the ordinary broker in which it was not agreed that a sale would be effected. The court said in such case it was not indispensable that a "valid, binding and enforceable contract" should be made.

In Mason v. Miller, 179 Ill. App. 347, Mason sued to recover commissions for the sale of defendant's farm. At the close of the evidence there was a motion of defendant for an instructed verdict in his behalf which was granted, and plaintiff appealed to the Appellate Court. The contract with the proposed purchaser had not been signed by him nor was it signed by the wife of the defendant, who at the request of the purchaser was a party to the sale. In affirming the judgment the opinion pointed out these facts and said:

"But if it had been signed by all the persons named therein as parties, it would have been but an option contract, in no way binding upon the purchaser to take the farm if he saw fit to forfeit the payment provided for therein, for the reason that the contract provided that in case of failure of the purchaser to make the payments therein mentioned, it was to be forfeited and determined, and all payments made thereunder up to such failure were to be forfeited and retained by the seller in full satisfaction of damages by him sustained. By the terms of the contract, the purchaser did not buy the farm, and a sale thereof was not effected."

The case of Lawrence v. Rhodes has been many times distinguished. Fox v. Starr, 106 Ill. App. 273; Russell v. Hurd, 113 Ill. App. 63, 66; Scott v. Stuart, 115 Ill. App. 535; Packer v. Sheppard, 127 Ill. App. 598; Carter v. Simpson, 130 Ill. App. 328;

the undisputed evidence shows only a contract to procure a house ready, able and willing to lease the premises on defendant's terms. Secondly, in that case the person who declined to purchase was the purchaser (and later on to the proposed tenant); in this case the party declining to purchase was the lessor (and later on to the owner in the Rhode case). In the Rhode case the opinion distinguished Wilson v. Mason, 128 Ill. 101, on this ground, saying that the contract was one of the ordinary broker in which it was not agreed that a sale would be effected. The court said in such case it was not indispensable that a "valid, binding and enforceable contract" should be made.

In Allen v. Miller, 109 Ill. App. 347, it was held to recover commission for the sale of defendant's farm. At the close of the evidence there was a motion of defendant for an instruction to verdict in his behalf which was granted, and plaintiff appealed to the Appellate Court. The contract with the proposed purchaser had not been signed by him nor was it allegedly the wife at the defendant, who at the request of the purchaser was a party to the sale. In affirming the judgment the opinion pointed out these facts and said:

"But it is not claimed by all the parties that it was a contract, it would have been an option contract, in no way binding upon the purchaser to take the land. He was free to forfeit the payment provided for therein, for the reason that the contract provided that in case of failure of the purchaser to make the payments therein mentioned, it was to be forfeited and determined, and all payments made thereunder up to such failure were to be forfeited and retained by the seller in full satisfaction of damages by him sustained. By the terms of the contract, the purchaser did not buy the farm, and a sale thereof was not effected."

The case of Laurance v. Rhodes has been many times distinguished. Fox v. Stuart, 106 Ill. App. 273; Russell v. Hunt, 113 Ill. App. 673; Scott v. Stuart, 115 Ill. App. 535; Walker v. Shepard, 127 Ill. App. 228; Stuart v. Rhodes, 130 Ill. App. 228.

Davis v. Pauler, 170 Ill. App. 317, 321. The distinction has also been recognized by the Supreme Court in Monroe v. Snow, et al, 131 Ill. 126, and cases there cited.

In Rushkiewicz v. St. George, 226 Ill. App. 310, the plaintiff recovered a judgment for his commission. The defendant had requested plaintiff to find a purchaser for his property at a price from \$14,500 to \$15,000. Plaintiff submitted the name of Bernard Pozorski, who offered \$14,200, and defendant accepted. A written contract was signed but before signing the defendant owner wrote into one of the blanks, "This contract binding only in case seller buys another property on North Side". The purchaser was dilatory in making preliminary payments. The property on the North Side had not been bought and the seller gave notice that he would not perform the contract. The broker then sued for commission and the seller defended on the ground that he had called off the sale under the clause inserted in the contract. The opinion of this court by Mr. Justice O'Connor said:

"The defendant having accepted Pozorski as a purchaser for his property by entering into the contract with him, and the defendant not having been influenced by any fraud or misrepresentation, such acceptance of the purchaser was a determination by defendant of Pozorski's ability to perform the contract; and the fact that afterwards Pozorski failed to perform it cannot defeat the broker's right to commission on the ground that the purchaser was not able to pay the amount required. Fox v. Ryan, 240 Ill. 391. In the instant case, although the contract could not be enforced by Pozorski on account of the condition in the contract mentioned, yet we think the execution of it by the defendant determined the ability of Pozorski to carry out its terms, since the condition which rendered the contract unenforceable was inserted for the sole benefit of the defendant and bore no relation to the readiness, ability or willingness of Pozorski to carry out the contract.

" * * * * A number of decisions announce the law to be that a real estate broker, to be entitled to his commission, must present a purchaser to his employer who is ready, able and willing to purchase the property on the terms proposed and he will then be entitled to a commission whether a contract is made or not. Some of these cases state further that if the principal accepts the purchaser either upon the terms previously proposed or upon modified terms then agreed upon and a valid

Davis v. Fowler, 170 Ill. App. 3d 521. The distinction has also been recognized by the Supreme Court in McGee v. McGee, 31 Ill. 2d 111, 126, and cases there cited.

In Rumkiewicz v. St. George, 226 Ill. App. 3d, the plaintiff recovered a judgment for his commission. The defendant had requested plaintiff to find a purchaser for his property at a price from \$14,500 to \$16,000. Plaintiff submitted the name of Bernard Rozorski, who offered \$14,500, and defendant accepted. A written contract was signed but before signing the defendant wrote into one of the blanks, "This contract binds only in case seller buys another property on North side". The defendant was dilatory in making preliminary payments. The property on the North side had not been bought and the seller gave notice that he would not perform the contract. The broker then sued for commission and the seller defended on the ground that he had called off the sale under the clause inserted in the contract. The opinion of this court by Mr. Justice O'Connor said:

"The defendant having accepted Rozorski as a purchaser for his property by entering into the contract with him, and the defendant not having been influenced by any fraud or misrepresentation, such acceptance of the purchaser was a determination by defendant of Rozorski's ability to perform the contract; and the fact that afterwards Rozorski failed to perform it cannot defeat the broker's right to commission on the ground that the purchaser was not able to pay the amount required. Id. 310, 311 Ill. 2d. In the instant case, Id. 311, 312 Ill. 2d. It would not be surprising if Rozorski had not been able to perform the contract, but we think the execution of it by the defendant before the expiration of the time for its performance, and the condition which was inserted in the contract, since the condition was inserted for the benefit of the defendant and not in relation to the purchaser's ability or willingness of Rozorski to carry out the contract.

" * * * A number of decisions have been made by this court that a real estate broker, to be entitled to his commission, must present a purchaser to his employer who is ready, able and willing to purchase the property on the terms proposed and he will then be entitled to a commission whether a contract is made or not. Some of these cases state further that if the principal accepts the purchaser either upon the terms originally proposed or upon modified terms then agreed upon and a valid

contract is entered into between the principal and the purchaser presented by the broker, the broker's commission is earned, but if the contract entered into is not enforceable then the broker is entitled to no commission. This latter statement is inaccurate and inconsistent with the first, because if the broker has presented a purchaser who is ready, able and willing to buy on the proposed terms, then he is entitled to his commission, and no contract which his employer and the purchaser may enter into can affect this right. This is obviously true and is so held in the authorities above cited."

The authorities are Monroe v. Snow, 131 Ill. 127;

Goodridge v. Holladay, 18 Ill. App. 363; Hersher v. Wells, 103 Ill. App. 418; Schulte v. Meehan, 133 Ill. App. 491.

While this opinion was in course of preparation the defendant called our attention to the recent case of Peterson v. Modern Woodmen of America, 290 Ill. App. 600, 8 N.E. (2nd) 704, in which leave to appeal was denied by the Supreme Court, 290 Ill. App. XIX. Defendant urges this case is decisive. There the plaintiff sued to recover commissions for obtaining a purchaser for the Saranac Building in Chicago. At the time the broker was employed defendant did not own the building and the written contract of employment was contingent upon the acquisition of such title. The broker produced a purchaser who entered into a contract also conditioned upon the acquisition of the title by defendant on or before a said date. Court proceedings were necessary. Title was not obtained within the time agreed and the purchaser and defendant cancelled the contract and money deposited under it was returned. There were issues of fact there as to waiver, etc. which had been found in favor of defendant by the trial court. The judgment for defendant was affirmed. The case is distinguishable by the material fact that the contract there between the defendant

contract is entered into between the original and the
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willing to pay on the proposed date, then he is
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his employer and the purser may enter into an
agreement with him. This is obviously true and is
held in the authorities above cited."

The authorities are People v. ..., 101 Ill. 127;

Goodridge v. ..., 18 Ill. App. 385; Wright v. ..., 103 Ill.
App. 418; Condit v. ..., 183 Ill. App. 401.

While this opinion was in course of preparation the de-
fendant called our attention to the recent case of Wright v. ...
Wright v. ..., 290 Ill. App. 800, 811 (2d) 704,
in which leave to appeal was denied by the Supreme Court, 290 Ill.
App. XIX. Defendant urges this case is decisive. There the
plaintiff sued to recover commissions for obtaining a purchaser
for the Bureau Building in Chicago. At the time the broker was
employed defendant did not own the building and the written con-
tract of employment was contingent upon the acquisition of such
title. The broker procured a purchaser who entered into a contract
also conditioned upon the acquisition of the title by defendant on
or before a said date. Court proceedings were necessary. Title
was not obtained within the time agreed and the purchaser and de-
fendant cancelled the contract and money deposited when it was
returned. There were issues of fact there as to waiver, etc. which
had been found in favor of defendant by the trial court. The
judgment for defendant was affirmed. The case is distinguishable
by the material fact that the contract there between the defendant

and the broker was conditioned upon the acquisition of the title.

There was no such condition in the contract between the broker and the defendant here, nor any issues of fact similar to those which existed in the Peterson case.

The plaintiff contends, as a matter of law, that under the general rule announced on three different occasions he had earned and was entitled to his commissions. First when the proposed offer was submitted to the defendant in Florida, which the defendant testified complied with the terms he submitted to the broker; secondly, at the meeting on April 2, when the lease drawn by defendant's attorneys was submitted and no objection made to it; and thirdly, upon the completion of the lease and supplemental agreement entered into on July 24, 1935. The defendant argues as to each of the first two occasions questions of fact were involved which are settled against plaintiff's contentions by the verdict of the jury. Defendant admits that if the agreement of July 24, 1935, amounted to a valid and binding contract, then, as a matter of law, defendant is liable.

The facts we have recited show that only one matter stood in the way of a complete understanding on July 24, 1935. This was the question which had arisen between the defendant and the proposed lessee about the possibility of obtaining a permit from the City of Evanston. We search the evidence in vain to find any facts from which it could be inferred that the earning of plaintiff's commissions was conditioned upon the obtaining of any such permit or that it was at any time made a condition precedent thereto. When the matter was first mentioned on April 2, the defendant stated that he would be able to secure the permit without difficulty. It turned out this was not true but it does not appear that any duty was cast upon plaintiff in that respect or that he was ever requested to obtain

and the broker was conditioned upon the approval of the title. There was no such condition in the contract between the broker and the defendant here, nor any issues of that nature to those which existed in the Paterson case.

The plaintiff contends, as a matter of law, that under

the general rule announced on three different occasions he had

earned and was entitled to his commission. That when the

proposed offer was submitted to the defendant in writing, which

the defendant testified supplied with the terms he submitted to

the broker; accordingly, at the meeting on April 2, when the terms

drawn by defendant's attorneys was submitted and no objection made

to it; and finally, upon the completion of the lease and assignment

agreement entered into on July 24, 1935. The defendant argues as

to each of the first two occasions questions of fact were involved

which are settled against plaintiff's contention by the verdict of

the jury. Defendant admits that in the agreement of July 24, 1935,

amounted to a valid and binding contract, then, as a matter of law,

defendant is liable.

The facts we have related show that only one matter needed

in the way of a complete understanding on July 24, 1935. This was

the question which had arisen between the defendant and the proposed

lessee about the possibility of obtaining a permit from the city of

Evansville. We search the evidence in vain for any facts from

which it could be inferred that the earning of defendant's commission

was conditioned upon the obtaining of any such permit or that it was

at any time made a condition precedent thereto. When the matter

was first mentioned on April 2, the defendant stated that he would

be able to secure the permit without difficulty. It turned out this

was not true but it does not appear that any duty was cast upon

plaintiff in that respect or that he was ever requested to obtain

any such permit. The uncontradicted testimony is to the effect that the theatre company was entirely willing to waive the 80 day provision and that, as a matter of fact, they never took advantage of it. We have seen from the authorities distinguishing the Lawrence-Rhodes case that a defendant cannot by availing himself of a condition of this kind deprive plaintiff of his right to recover commissions which he has earned. There is no evidence that defendant at any time informed plaintiff that the obtaining of the permit was a condition precedent to the payment of his commission. As we have already seen, evidence was excluded by defendant's objection which ought to have been admitted. It is a fair inference from all the evidence that defendant while soliciting plaintiff to obtain a tenant for him was in fact negotiating with Balaban & Katz for an advantageous sale and to that end appropriating the plaintiff's services. Irrespective of other occasions, it must be held as a matter of law that defendant is concluded by the contract of July 24, 1935, and that plaintiff is entitled to recover from defendant the balance of commissions due him in the amount of \$3700. Judgment will be entered against defendant and in favor of plaintiff in this court for that amount.

REVERSED WITH JUDGMENT HERE
AGAINST DEFENDANT AND IN FAVOR OF
PLAINTIFF IN THE AMOUNT OF \$3700.00.

McSurely, P. J., and O'Connor, J., concur.

any such permit. The uncontradicted testimony is to the effect that the theatre company was entirely willing to waive the 80 day provision and that, as a matter of fact, they never took advantage of it. It is also seen from the authorities distinguishing the Lawrence-Robes case that a defendant cannot by availing himself of a condition of this kind deprive plaintiff of his right to recover commissions which he has earned. There is no evidence that defendant at any time informed plaintiff that the obtaining of the permit was a condition precedent to the payment of his commission. As we have already seen, evidence has been excluded by defendant's objection which ought to have been admitted. It is a fair inference from all the evidence that defendant while soliciting plaintiff to obtain a tenant for him was in fact negotiating with Belknap & Sons for an advantageous sale and to that end appropriating the plaintiff's services. Irrespective of other considerations, it must be held as a matter of law that defendant is concluded by the contract of July 24, 1932, and that plaintiff is entitled to recover from defendant the balance of commissions due him in the amount of \$7,000. Judgment will be entered against defendant and in favor of plaintiff in this court for that amount.

REVEREND JUDGE OF THE COURT
ALLIED BANK AND TRUST CO.
PLAINTIFF IN THE AMOUNT OF \$7,000.00.

McGuire, J., and Conner, J., concur.

MORRIS RUBINSON,
Appellant,

vs.

ARMOUR AND COMPANY, an Illinois
Corporation, and R. H. CABELL,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

298 I.A. 620²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Rubinson on March 28, 1938, filed notice of a separate appeal from Paragraph 2 of an order entered December 29, 1937. The order was entered upon defendant's "amended motion to dismiss the amended complaint of said plaintiff." Paragraph 2 of the order appealed from states, "That said motion to dismiss is sustained as to the amended complaint of Morris Rubinson, being Count III thereof, and said plaintiff electing to stand by said Count, the same is hereby finally dismissed."

The record filed in this court purports to describe an "amended complaint" filed August 27, 1937, in a cause wherein Morris Rubinson and Michael Gidwitz are plaintiffs and Armour and Company, an Illinois corporation, et al., defendants. The pleading describes itself as "Count III, an amendment of the complaint filed herein, November 27, 1936." The record does not contain any complaint filed on November 27, 1936. It therefore appears the pleading is a part of another pleading which is not in the record. An examination of Count III discloses that it refers to supposed rights of Rubinson only. In substance it avers that he is an original subscriber, owner and holder of 5 shares of 7% cumulative preferred shares of stock of Armour and Company, evidenced by certificate issued December 27, 1924, which is attached; that these shares issued as part of a reorganization, were acquired at the solicitation of the company of which at that time a majority of the defendants (unnamed) or their relatives or associates were directors; that the corporation was organized under the laws of

MORRIS RUBINSON,
Appellant,

v.

ARMOUR AND COMPANY, an Illinois
Corporation, and A. L. CARMAN,
Appellees.

MR. JUSTICE PATRICK DELIVERED THE OPINION OF THE COURT.

Rubinson on March 22, 1932, filed his motion for a writ of habeas corpus from Paragraph 2 of an order entered December 22, 1931. The order was entered upon defendant's "amended motion to dissolve the amended complaint of said plaintiff." Paragraph 2 of the order so recited from states, "that said motion to dissolve is sustained as to the amended complaint of Morris Robinson, being Count III except, and said plaintiff electing to stand by said Count, the same is hereby finally dismissed."

The record filed in this court purports to describe an "amended complaint" filed August 27, 1932, in a case wherein Morris Robinson and several others are plaintiffs and Armour and Company, an Illinois corporation, et al., defendants. The pleading describes itself as "Count III, an amendment of the complaint filed herein, November 27, 1932." The record does not contain any complaint filed on November 27, 1932. It therefore appears that plaintiff is a party of another pleading which is not in the record. An examination of Count III discloses that it refers to supposed rights of a man only. In substance it avers that he is an original subscriber, owner and holder of 3 shares of the cumulative preferred stock of Armour and Company, evidenced by certificate issued December 22, 1931, which is attached; that these shares issued as part of a reorganization were acquired at the solicitation of the company of which at that time a majority of the defendants (unnamed) or their relatives or associates were directors; that the corporation was organized under the laws of

Illinois on April 7, 1900; that as of January 1, 1931, there were three types of shares authorized by the charter of the corporation; that dividends were to be paid on preferred shares out of net profits as declared, not in excess of 7% per annum; that dividends on other and different kinds of stock should not be paid unless prior dividends had been paid on the preferred stock and sufficient funds remain to pay preferred dividends for one year in advance; that the preferred stock might be redeemed by payment of \$115 per share plus accrued dividends; that these provisions with others were set forth in the certificate of stock and in the charter of the company and contained other provisions in conformity with Sections 61-64 of chapter 32 of Cahill's Illinois Rev. Stats., 1931; that the preferred dividends were partially paid but that on November 1, 1936, there was a total accumulated unpaid dividends upon each share of the preferred of \$31.50. Paragraph 8 avers: "The company has paid and is threatening to pay dividends without paying accumulations and current dividends on preferred shares, including the plaintiff's, in contravention of the plaintiff's rights and priorities as aforesaid." The pleading prays for an injunction against paying any dividends until accumulated dividends of \$31.50 and current dividends are paid on preferred shares.

On December 29, 1937, the defendants (Armour and Company and R. H. Cabell) filed an "amended motion to dismiss" the "amended complaint and Counts I, II and III thereof" because of a misjoinder of plaintiffs and a misjoinder of counts, because the allegations of Counts I and II are inconsistent affording no basis for a cause of action and because no judgment could be given in favor of both plaintiffs since one is a holder of 7% preferred stock and the other plaintiff is a holder of 6% prior preferred stock and for other reasons stated in the motion.

If the purpose of Robinson in filing this appeal is to

prevent confusion, the purpose has not been accomplished. The record does not contain the original complaint. As already stated, the amended complaint designates itself as an amendment to the complaint filed November 27, 1936. No such complaint is found in the record. Neither Count I nor Count II is in the record. There is nothing before us by which the rights of any of the parties can be determined with certainty. Manifestly there is a misjoinder of parties. It is pointed out that under Section 26 of the Civil Practice Act (construed in Hitchcock v. Reynolds, 278 Ill. App. 559-62) misjoinder of parties is not sufficient ground for dismissing a suit. The order of December 29 shows that the motion of defendants was sustained as to Count I of the amended complaint of Michael Gidwitz; that he elected to stand by the count and the same was finally dismissed. The third paragraph of the order shows that the motion was overruled as to the amended complaint of Morris Robinson and Michael Gidwitz, being Count II thereof, and leave was given to defendants to answer within 20 days. It therefore appears that there is now pending in the Superior court the amended complaint of both Robinson and Gidwitz, on which for aught we can tell^{all}/the rights of all the parties may be adjudicated. A party may not succeed upon an appeal by bringing up only a fragment of a record from which it is impossible to determine what the rights of the parties litigating may be. There is no averment in Robinson's pleading that preferred dividends were unpaid on August 27, 1937, when his amended pleading was filed. As already stated, there is an averment that part of these dividends were unpaid on November 1, 1936. It is a fair inference that such payment had been made before August 27, 1937. Upon oral argument this was stated to be true by attorney for defendants and was not denied by attorney for Robinson, plaintiff Robinson taking the position this was appealing to matters outside the record. The pleadings are to be

prevent confusion, the purpose has not been accomplished. The record does not contain the original complaint. As stated, the amended complaint designated it as an amendment to the complaint filed November 27, 1935. It was designated as such in the record. Whether Count I or Count II is in the record, it is nothing before us by which the rights of any of the parties can be determined with certainty. The record shows it is a complaint of parties. It is pointed out that later section 26 of the Illinois Practice Act (enacted in 1935) Illinois v. Board of Education, 275 Ill. App. 559-62) jurisdiction of parties is not sufficient to remove the case from a suit. The order of November 23 shows that the suit was removed from the court as to Count I of the complaint designated by Michael Givetta; and as stated to state by the court that the case was timely filed. The third paragraph of the order states that the action was overruled as to the amended complaint of holding Rabinowitz and Michael Givetta, being Count II correct, and the case given to the parties to answer within 30 days. It therefore appears that there is now pending in the Superior Court the case of complaint of both Rabinowitz and Givetta, on which the right was not left. The right of the parties may be established. A party may not recover from a party by filing a third party complaint. The record then shows it is impossible to determine what the parties' the parties designated as Count I. There is no answer in Rabinowitz's pleading that Givetta's complaint was made on August 27, 1935, when his amended pleading was filed. He already stated, there is an agreement that part of these complaints were made on August 27, 1935. It is a fair inference that such agreement had been made before August 27, 1935. When oral agreement is made stated to be true by testimony for testimony and was not denied by testimony for testimony, plaintiff Rabinowitz taking the position that was agreed to matters outside the record. The pleadings are to be

construed most strongly against him. Every presumption is in favor of the action of the nisi prius court. No sufficient reason has been shown to reverse, and the order is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

McNulty, J. J., and O'Connor, J. J.

40014

D. I. DORMEYER and OTTO F.
DORMEYER,

Appellants,

vs.

A. F. DORMEYER MANUFACTURING
COMPANY, a corporation; H. A.
DORMEYER; EARL LUDGIN; JOSEPH
J. MILOSCH and J. N. MOYLAN, as
Creditors' Committee of the
A. F. Dormeyer Manufacturing
Company,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, as stockholders of defendant A. F. Dormeyer Manufacturing Company, a corporation, filed their complaint in chancery against defendants claiming that 5,000 shares of the increased capital stock of defendant company was improperly issued because it had not been paid for; and the prayer in this connection was that 2,600 shares of such stock issued December 1, 1931, be ordered cancelled. There were other matters urged in the complaint which are of no importance on this appeal. After the issues were made up, the cause was referred to a master in chancery who took the evidence, made up his report and found that 2600 shares of the capital stock had been validly issued and recommended that a decree be entered sustaining the validity of those shares of stock; and other recommendations were made which are not involved here. A decree was entered in conformity with the recommendations of the master and plaintiffs appeal.

The record discloses that on September 27, 1929, the A. F. Dormeyer Manufacturing Company was incorporated in this state; the capital stock was 10,000 shares of no par value, which was

398 LA 620

40014

D. I. DORNEYER and OTTO R.
DORNEYER,

Appellants,

vs.

A. F. DORNEYER MANUFACTURING
COMPANY, a corporation; DORNEYER,
DORNEYER and J. I. DORNEYER, as
creditors, Committee of the
A. F. Dorneyer Manufacturing
Company,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, as stockholders of defendant A. F. Dorneyer Manufacturing Company, a corporation, filed their complaint in chancery against defendants claiming that 2,000 shares of the increased capital stock of defendant company was improperly issued because it had not been paid for; and the prayer in this connection was that 2,000 shares of such stock issued December 1, 1921 be ordered cancelled. There were other matters urged in the complaint which are of no importance on this appeal. After the issues were made up, the cause was referred to a master in chancery who took the evidence, made up his report and found that 2,000 shares of the capital stock had been validly issued and recommended that decree be entered sustaining the validity of those shares of stock and other recommendations were made which are not involved here. A decree was entered in conformity with the recommendations of the master and plaintiff's appeal.

The record discloses that on September 27, 1922, A. F. Dorneyer Manufacturing Company was incorporated in this state; the capital stock was 10,000 shares of no par value, which was

stated to be paid for in property appraised at \$131,663.25. A. F. Dormeyer, who was afterward president, subscribed for 5,030 shares; plaintiff, D. I. Dormeyer, his wife, who was secretary, 4,780 shares; J. E. Novak, 50 shares; B. H. Decker, 40 shares and Charles C. Bombaugh 100 shares. The books of the Manufacturing Company, contrary to the provisions in the charter, showed a capitalization of the company of \$100,000 and a surplus of \$31,663.25, and the evidence shows it was the intention of the incorporators and subscribers that the capitalization should be as shown by the books. The master found that the attorney, in preparing ^{the} application for the charter made a mistake. It further appears that in June or July, 1931, one of the banks with which the Manufacturing Company did business insisted that the surplus as shown by the books of the company should be eliminated. To bring this about, A. F. Dormeyer, the president, and his wife, D. I. Dormeyer, the secretary of the company, who were then the owners of 9,658 shares of the outstanding capital stock of the company of 9,948 shares, on July 30, 1931, filed with the Secretary of State an application for permission to increase the capital stock of the Company from 10,000 shares to 15,000 shares of no par value. This document, signed by the secretary and signed and sworn to by the president of the company, recited the giving of notice required by law to each stockholder, etc., of the time and place of the special meeting of the stockholders; that at such meeting a resolution was passed that the capital stock be increased from 10,000 shares to 15,000 shares of no par value; that the increase of 5,000 shares was to be paid for in cash of \$18,336.75. August 14, 1931, the Secretary of State issued his certificate of such increase in the capital stock of the company. At that time the two plaintiffs were members of the board of directors of the corporation; the other two directors were A. F. Dormeyer, the president, and B. H.

other two directors were A. E. Dormeyer, the president, and E. H. were members of the board of directors of the corporation; the in the capital stock of the company. At that time the two plaintiffs the Secretary of State issued his certificate of such increase shares was to be paid for in cash of \$18,380.75. August 14, 1931, to 15,000 shares of no par value; that the increase of 5,000 was passed that the capital stock be increased from 10,000 shares meeting of the stockholders; that at each meeting a resolution each stockholder, etc., of the time and place of the special of the company, recited the giving of notice required by law to signed by the secretary and signed and sworn to by the president 10,000 shares to 15,000 shares of no par value. This document, for permission to increase the capital stock of the Company from on July 30, 1931, filed with the Secretary of State an application of the outstanding capital stock of the company of 9,948 shares, secretary of the company, who were then the owners of 9,953 shares A. E. Dormeyer, the president, and his wife, D. I. Dormeyer, the books of the company should be eliminated. To bring this about, Company did business insisted that the surplus be shown by the or July, 1931, one of the books with which the Manufacturing The master found that the attorney, in preparing ^{the} application for the charter made a mistake. It further appears that in June 1931, the books of the Manufacturing Company, contrary to the provisions in the charter, showed a capitalization of the company of \$100,000 and a surplus of \$21,663.25, and the evidence shows it was the intention of the incorporators and subscribers that the capitalization should be as shown by the books. C. Bombardier 100 shares. The books of the Manufacturing Company, shares; J. E. Novak, 50 shares; B. L. Becker, 40 shares and Charles plaintiff, D. I. Dormeyer, his wife, who was secretary, 4,780 Dormeyer, who was afterward president, subscribed for 5,000 shares; stated to be paid for in property appraised at \$131,663.25. A. E.

Decker, such four persons at the time being all of the stockholders.

The master found that as a matter of fact there was no meeting of the stockholders or directors called or held for the purpose of authorizing the increase of the capital stock. August 31, 1931, shortly after the increase was authorized by the Secretary of State, the corporation issued its certificate to A. F. Dormeyer, the president, for 4,830 shares of the increase. This certificate was signed by him as president and by his wife, one of the plaintiffs, as secretary. On the same day an entry was made in the books of the corporation crediting the capital stock with \$50,000 which was charged against the \$31,663.25 which was then carried on the books as surplus, and the balance of about \$18,000, to make up the \$50,000 - 5,000 shares at \$10 per share. December 31, 1931, A. F. Dormeyer transferred and assigned the certificate for 4,830 shares to the Company and a new certificate was issued to him for the 2,600 shares involved in this suit.

July 8, 1932, defendant, H. A. Dormeyer obtained a judgment in the Municipal Court of Chicago for \$37,786.75 against his brother, A. F. Dormeyer, president of the corporation, and sought to levy upon 7,479 shares of stock which it was claimed were owned by A. F. Dormeyer, the judgment debtor, but at the time these shares of stock stood in the name of D. I. Dormeyer, the president's wife; the 2,600 shares were included in the 7,479 shares. The bailiff being unable to levy on the shares of stock which stood in the name of D. I. Dormeyer, the wife, thereafter H. A. Dormeyer filed his bill in the Superior Court of Cook County setting up that the stock was owned by the judgment debtor and that it be so decreed, so that the bailiff could sell the stock. October 27, 1933, a decree was entered by the Superior Court in accordance with the prayer of the bill and afterward the bailiff of the Municipal Court sold the shares of stock according to law and they were

Becker, each four persons at the time being all of the stockholders.

The master found that as a matter of fact there was no

meeting of the stockholders or directors called or held for the

purpose of authorizing the increase of the capital stock. Against

31, 1931, shortly after the increase was authorized by the State-

tary of State, the corporation issued its certificate to A. T.

Dornmeyer, the president, for 4,830 shares of the increase. This

certificate was signed by him as president and by his wife, one of

the plaintiffs, as secretary. On the same day an entry was made in

the books of the corporation attributing the capital stock with

\$50,000 which was charged against the \$21,685.45 which was then

carried on the books as surplus, and the balance of about \$28,000,

to make up the \$50,000 - 5,000 shares at \$10 per share. December

31, 1931, A. T. Dornmeyer transferred and assigned the certificate

for 4,830 shares to the company and a new certificate was issued

to him for the 5,000 shares involved in this suit.

July 8, 1932, defendant, A. T. Dornmeyer obtained a judgment

in the Municipal Court of Chicago for \$37,756.75 against his

brother, A. T. Dornmeyer, president of the corporation, and sought

to levy upon 7,479 shares of stock which it was claimed were owned

by A. T. Dornmeyer, the judgment debtor, but at the time these

shares of stock stood in the name of I. I. Dornmeyer, the presi-

dent's wife; the 5,000 shares were included in the 7,479 shares.

The plaintiff being unable to levy on the shares of stock which stood

in the name of D. I. Dornmeyer, the wife, thereafter H. A. Dornmeyer

filed his bill in the Superior Court of Cook County setting up

that the stock was owned by the judgment debtor and that it be

so decreed, so that the plaintiff could sell the stock. October 27,

1933, a decree was entered by the Superior Court in accordance with

the prayer of the bill and afterward the plaintiff of the Municipal

Court sold the shares of stock according to law and they were

purchased by the judgment creditor, H. A. Dormeyer. In the Superior Court case, A. F. Dormeyer, D. I. Dormeyer, the corporation, A. F. Kloehr and J. J. Milosch were made defendants. The bill charged that A. F. Dormeyer made a pretended sale of the shares of stock to his wife for the purpose of preventing the bailiff of the Municipal Court from levying on the stock. In her answer filed in that case, Mrs. Dormeyer averred that she was the owner of the shares of stock and that she had paid for them with her own money.

There is also evidence to the effect that the corporation, at the time it issued its stock for the increase was indebted to A. F. Dormeyer and wife and that the new stock was charged in part against this indebtedness.

The record further tends to show that as a result of the selling of the 2,600 shares of stock and the other shares by the bailiff of the Municipal Court, A. F. Dormeyer and his wife lost control of the company, the controlling interest having passed to other hands, and that afterward the complaint in the instant case was filed by Mrs. Dormeyer and Otto F. Dormeyer, a brother of A. F. Dormeyer, to cancel the 2,600 shares and apparently if this result was brought about the controlling interest would again be in A. F. Dormeyer and wife or the creditors' committee.

There is little or no dispute in the evidence but plaintiffs' position is that the increase of the capital stock was void because no statement of such increase was properly filed in the office of the Secretary of State, as the statute provides; that there was no special meeting of the stockholders held which authorized the increase of the capital stock, and that the increase which included the 2,600 shares in question was not paid for.

The master found that the books of the corporation January 1, 1932, showed an indebtedness of the company to A. F. Dormeyer

...purchased by the judgment creditor, A. A. Dornmeyer. In the corporation
Court case, A. A. Dornmeyer, D. I. Dornmeyer, the corporation, A. A.
Kloster and J. J. Kloss were made defendants. The bill charged
that A. A. Dornmeyer made a pretended sale of the shares of stock to
his wife for the purpose of preventing the liability of the corporation
Court from levying on the stock. In her answer filed in that case,
Mrs. Dornmeyer averred that she was the owner of the shares of stock
and that she had paid for them with her own money.
There is also evidence to the effect that the corporation,
at the time it issued its stock for the increase was indebted to
A. A. Dornmeyer and wife and that the new stock was charged in
part against this indebtedness.
The record further tends to show that as a result of the
selling of the 2,600 shares of stock and the other shares by the
liability of the Municipal Court, A. A. Dornmeyer and his wife lost
control of the company, the controlling interest having passed to
other hands, and that at around the complaint in the instant case
was filed by Mrs. Dornmeyer and Otto E. Dornmeyer, a brother of A.
K. Dornmeyer, to cancel the 2,600 shares and apparently in this
result was brought about the controlling interest would again be in
A. A. Dornmeyer and wife or the creditors' committee.
There is little or no dispute in the evidence but plain-
tiff's position is that the increase of the capital stock was void
because no statement of such increase was properly filed in the
office of the Secretary of State, as the statute provides; that
there was no special meeting of the stockholders held which author-
ized the increase of the capital stock, and that the increase which
included the 2,600 shares in question was not paid for.
The master found that the books of the corporation January
1, 1922, showed an indebtedness of the company to A. A. Dornmeyer

of but \$10.77 and not \$30,000, from which he concluded that "A.F. Dormeyer's account was charged with the price of the new stock issued to him." The master further found that some part of the books were destroyed by the direction of A. F. Dormeyer and that plaintiffs had failed to produce evidence to sustain the burden the law placed upon them that the 2,600 shares had not been paid for but on the contrary the master found that "the preponderance of the evidence is to the effect that the said shares of stock were paid by a charge against the moneys due to A. F. Dormeyer and D. I. Dormeyer from the corporation, and by the application of the paid in surplus of \$31,663.25 to capital." The finding of the master was in all respects approved by the chancellor and we think it was the only finding warranted by the evidence. Certain it is we would not be warranted in holding that the finding of the master, approved as it was by the chancellor, is against the manifest weight of the evidence. Pasedach v. Auw, 364 Ill. 491.

Plaintiffs cannot now complain that the provisions of the statute applicable to the increase of capital stock by a corporation was not technically complied with. Moreover, we are of opinion that plaintiffs are estopped to contend in the instant case that the 2,600 shares of stock were not paid for because of the decree entered in the Superior Court. In that case A. F. Dormeyer, D. I. Dormeyer, the corporation and two others were defendants. The issue raised there was as to whether the 2,600 shares as well as other shares of stock belonged to A. F. Dormeyer or his wife. Mrs. Dormeyer in her answer averred that they belonged to her because she had paid for them with her own money. The court decreed against her and that decree has not been reversed or modified. Obviously she cannot now be heard to say that the 2,600 shares of stock had been issued without consideration and therefore void. Nor do we think that Otto F. Dormeyer, the other plaintiff, is in any better

of but \$10.77 and not \$30,000, from which is concluded that "A."

Dormeyer's account was charged with the price of the new stock issued to him." The master further found that some part of the

books were destroyed by the direction of A. I. Dormeyer and that

plaintiffs had failed to produce evidence to sustain the burden

the law placed upon them that the 2,500 shares had not been paid

for but on the contrary the master found that "the preponderance

of the evidence is to the effect that the 2,500 shares of stock were

paid by a charge against the money due to A. I. Dormeyer and D.

I. Dormeyer from the corporation, and by the application of the paid

in surplus of \$1,663.25 to capital." The finding of the master

was in all respects approved by the chancellor and we think it was

the only finding warranted by the evidence. Certain it is we would

not be warranted in holding that the finding of the master,

approved as it was by the chancellor, is against the manifest

weight of the evidence. Passafium v. A.W., 304 Ill. 491.

Plaintiffs cannot now complain that the provisions of the

statute applicable to the increase of capital stock by a corporation

was not technically complied with. Moreover, we are of opinion

that plaintiffs are estopped to contend in the present case that the

2,500 shares of stock were not paid for because of the decree

entered in the Superior Court. In that case A. I. Dormeyer, D. I.

Dormeyer, the corporation and two others were defendants. The issue

raised there was as to whether the 2,500 shares as well as over

shares of stock belonged to A. I. Dormeyer or his wife. Mrs.

Dormeyer in her answer averred that they belonged to her because

she had paid for them with her own money. The court decreed against

her and that decree has not been reversed or modified. Obviously

she cannot now be heard to say that the 2,500 shares of stock had

been issued without consideration and therefore void. Or do we

think that Otto V. Dormeyer, the other plaintiff, is in any better

position. Apparently he was not a party to the Superior Court action but he was a director of the company and the company was a party defendant, and it could have been urged that the stock was invalid because it had not been paid for, but such defense was not made by anyone. The decree of a court of general jurisdiction is not only res adjudicata of the issues squarely involved, but often it is res adjudicata of any other issues that might be raised in that case. If it had been decreed by the Superior Court that the 2,600 shares were void, obviously this suit would not be brought. Plaintiff, Otto F. Dormeyer, did not testify in this case.

There is much evidence in the record and findings of the master and of the chancellor to which we have made no reference but we are clear that upon a consideration of all the evidence in the record plaintiffs' contention cannot be sustained, and the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

position. Apparently he was not a party to the Superior Court action but he was a director of the company and the company was a party defendant, and it could have been urged that the stock was invalid because it had not been paid for, but such defense was not made by anyone. The defense of a writ of habeas corpus is not only res adjudicata of the issues actually involved, but often it is res adjudicata of any other issues that might be raised in that case. If it had been decided by the Superior Court that the \$100 shares were void, obviously this writ would not be granted. Plaintiff, Otto E. Thompson, did not testify in this case.

There is much evidence in the record and findings of the master and of the chancellor to which we have made no reference but we are clear that upon a consideration of all the evidence in the record plaintiff's contention cannot be sustained, and the decree of the Circuit Court of Cook County is affirmed.

ROBERT A. KIRKEND, JR.

ROBERT A. KIRKEND, JR., and KIRKEND, JR., counsel.

MAX ADLER,
Appellee,

vs

B. J. ALTHEIMER, D. J.
BRUMLEY and JACOB LEVIN,
Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

298 I.A. 620⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint in chancery against the three defendants as a committee praying that defendants be decreed to endorse a \$49,000 check made payable jointly to plaintiff and defendants and to deliver the check to plaintiff. The case was heard by the chancellor, a decree was entered as prayed for and defendants appeal.

The record discloses that in 1927 Straus Brothers Investment Company was engaged in the business of underwriting first mortgage bond issues, and at that time agreed to loan \$600,000 to the Sylvester Lewis Realty Company, a Missouri corporation, with which to construct and equip a hotel in St. Louis, Mo. April 20, 1927, the Realty Company executed its trust deed conveying the St. Louis property, together with the building to be erected thereon, to secure the payment of the \$600,000. The loan agreement provided that the Straus Company would reserve \$70,000 of the amount loaned to pay for the furniture and furnishings of the hotel. The money was to be paid out by Straus as the building progressed. It was found that the cost of the building would exceed the amount provided for that purpose. In October, 1927, the Realty Company asked Straus to release the \$70,000 so that it might be used to pay for the completion of the building. This was agreed to provided the Realty Company would give a surety bond to Straus that the hotel, when completed would be fully equipped and furnished and on October 12,

MAX ADLER, Appellee,

vs

R. T. LUTHER, D. T. BROWN and JACOB LEVY, Appellants.

WITNESSES

JOHN A. TON

COOK COUNTY.

223 I.A. 620

MR. JUSTICE O'NEILL DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint in chancery against the three defendants as a committee praying that defendants be decreed to endorse a \$42,000 check made payable jointly to plaintiff and defendants and to deliver the check to plaintiff. The case was heard by the chancellor, a decree was entered as prayed for and defendants appeal.

The record discloses that in 1927 Straus Brothers Investment Company was organized in the business of underwriting first mortgage bond issues, and at that time agreed to loan \$800,000 to the Sylvester Lewis Realty Company, a Missouri corporation, with which to construct and equip a hotel in St. Louis, Mo. April 30, 1927, the Realty Company executed its trust deed conveying the St. Louis property, together with the building to be erected thereon, to secure the payment of the \$800,000. The loan agreement provided that the Realty Company could receive 70,000 of the amount loaned to pay for the furniture and furnishings of the hotel. The money was to be paid out by Straus as the building progressed. It was found that the cost of the building would exceed the amount provided for that purpose. In October, 1927, the Realty Company asked Straus to release the 70,000 so that it might be used to pay for the completion of the building. This was agreed to provided the Realty Company would give a surety bond to Straus that the hotel, when completed would be fully equipped and furnished and on October 12,

1927, such surety bond was delivered to Straus, signed by the Realty Company, as principal, and the Hartford Accident & Indemnity Company as surety, wherein they bound themselves to the trustees in the trust deed in the principal sum of \$75,000. The bond recited the obligation of the Realty Company, the principal, to construct the hotel and to furnish and equip it at a cost of not less than \$70,000 on or before February 1, 1928, free and clear of all liens and claims. Upon receipt of the bond, Straus agreed to permit the \$70,000 reserved to be applied toward the payment of the hotel building and this amount was thereafter paid out by Straus and charged to the Realty Company. After the completion of the building, the Realty Company was unable to obtain the necessary furniture and furnishings. Thereafter Straus guaranteed to the merchants payment for the furniture and fixtures installed in the hotel. Afterward the Realty Company and the Surety Company failed to pay for the furniture and furnishings and Straus paid approximately \$71,000 for them. Demands were made both upon the Realty Company and the Surety Company to repay the \$71,000, but payment was refused. Thereafter, in 1929, suit was brought in St. Louis against the Realty Company and the Surety Company on the bond and in 1934 a judgment was entered in that case against the Surety Company for \$85,448.60. This judgment was afterward settled for \$71,000 and after deducting the attorneys' fees and certain other expenses, there remained a net amount of \$49,000 due to Straus and those claiming under it. Both plaintiff and defendants in the instant case made claim to the \$49,000 and therefore the Surety Company made its check payable to the plaintiff and defendants, jointly, and it was certified by a Chicago bank.

In April, 1930, Straus was in need of funds and borrowed \$350,000 from plaintiff and April 28, 1930, gave its note for that amount due on or before two years after date, and on the next day executed and delivered to plaintiff its collateral

1931, and security bond was delivered to the court by the plaintiff
Company, as principal, and the defendant, as surety. The plaintiff
paid as security, through its bank, \$25,000. The bank retained
the trust deed in the principal sum of \$25,000. The bank retained
the obligation of the security company, as principal, to guarantee
the hotel and to furnish and equip it at a cost of not less than
\$7,000 on or before February 1, 1932, and to keep it in all times
and claims. Upon receipt of the bond, the bank agreed to permit
the \$25,000 reserved to be applied toward the payment of the hotel
building and this amount was then withdrawn and paid by the bank
charged to the security company. After the completion of the building
first, the security company was held to be liable for the remaining balance
and for all claims. The plaintiff then guaranteed to the bank
payment for the full time and expenses incurred in the hotel.
Afterwards the security company and the bank company failed to
pay for the building and improvements and the bank paid the balance
of \$21,000 for them. The bank was then on the record
Company and the security company to repay the \$21,000 and to permit
was released. Thereafter in 1932, the bank was permitted to release
against the bank's Company and the security company on the bond and
in 1934 a judgment was entered in that case against the security
Company for \$25,442.50. This judgment was affirmed and entered for
\$21,000 and after deduction the plaintiff's bond and costs in other
expenses, there remained a net amount of \$21,000 and to the
and those claiming under it. The plaintiff and defendant in
the first case made claim to the \$21,000 and the plaintiff and
security company made the second appeal to the plaintiff and
defendant, jointly, and it was certified to a higher court.
In April, 1935, there was an appeal of the bond and borrowed
\$250,000 from plaintiff and April 25, 1935, gave its note for
that amount due on or before two years after date, and on the
next day executed and delivered to plaintiff the certificate

deposit and pledge agreement. This agreement specified a great number of shares of stock and bonds that were pledged to secure the payment of the \$350,000. Included in such pledged assets was "the interest of Straus in and to the bond in the principal sum of \$75,000 guaranteeing the payment and installation of furnishings" in the St. Louis Hotel (being the surety bond executed by the Realty Company as principal and the Hartford Accident and Indemnity Company as surety, above referred to.) The collateral deposit and pledge agreement further provided that as long as Straus was not in default to plaintiff, Straus had the right to withdraw certain of the pledged securities upon paying certain specified sums, one of which was that Straus might withdraw from the pledged collateral the surety bond upon payment of \$35,000⁶². The collateral mentioned in this agreement, with the exception of the surety bond, was delivered by Straus to plaintiff, Adler, and two days thereafter, May 1, Straus executed and delivered to plaintiff an assignment of the surety bond assigning to Adler all of the Straus interest in and to the surety bond, as part of the collateral to secure the payment of the \$350,000.

September 1930, about four months after the assignment by Straus to plaintiff, Straus found itself in need of further sums of money which it undertook to raise by selling a \$600,000 collateral note issue and in this connection it entered into an Indenture of Trust with the Foreman Trust & Savings Bank, as trustee. To carry this out, Straus delivered a great many different securities to the bank, aggregating over \$800,000 as collateral. Included in this collateral was an assignment dated September 17, 1930, of "that portion of the Account Receivable in the sum of \$75,700 not exceeding the sum of \$50,700 due to the undersigned from Sylvester Lewis Realty Company *** said sum of \$50,700 having been advanced by the undersigned as part of the payment for furniture, furnishings, personal property and equip-

... the St. Louis hotel. That document also

deposit and pledge agreement. This agreement provided a fixed number of shares of stock and bonds that were eligible to secure the payment of the \$250,000. Included in such pledge was the "the interest of shares in and to the bond in the principal sum of \$75,000 guaranteeing the payment and satisfaction of bonds of \$75,000 in the St. Louis Hotel (being the equity bond executed by the Realty Company as surety, above referred to). The said equity bond and pledge agreement further provided that as long as the shares are not in default to plaintiff, the same shall be right to withdraw certain of the pledged securities upon paying certain specified sums, one of which was that the equity bond should first be paid in full. The equity bond was on payment of \$40,000. The equity bond mentioned in this agreement, with the exception of the equity bond, was delivered by terms to plaintiff, later, and two days thereafter, say 1, 1930, was executed and delivered to plaintiff in assignment of the equity bond according to which all of the shares interest in and to the equity bond, as part of the collateral to secure the payment of the \$250,000.

September 1930, about four months after the assignment by terms to plaintiff, the same bond was in need of further sums of money which it undertook to raise by selling a \$250,000 collateral note issue and in this connection it entered into an agreement with the plaintiff that a certain bond, to wit, the equity bond, should be delivered to the plaintiff. To carry this out, the same delivered a bond to the plaintiff, representing over \$200,000 in different securities to the bank, representing over \$200,000 in collateral. Included in this collateral was a certain bond.

September 17, 1930, of that portion of the account receivable in the sum of \$75,000 not exceeding the sum of \$50,000 due to the undersigned from Sylvester Louis Realty Company Ltd with sum of \$10,000 having been advanced by the undersigned as part of the payment for furniture, furnishings, personal property and other items. The said equity bond.

assigned to the bank as Trustee, "the surety bond in the principal sum of \$75,000, dated October 12, 1927, executed by Sylvester Lewis Realty Company, as Principal, Hartford Accident and Indemnity Company, as Surety *** guaranteeing the payment and installation of furnishings in said Fairgrounds Hotel, covered by said Account Receivable.***

"The undersigned represents that the surety bond in the principal sum of \$75,000, listed in the aforesaid collateral, has heretofore been pledged with other collateral to one Max Adler (plaintiff); that said bond and said other collateral can be released from said pledge to Max Adler upon payment of \$25,000; that the undersigned holds and owns an Account Receivable from Sylvester Lewis Realty Company in the sum of \$25,000 in addition to the aforesaid Account Receivable in the sum of \$50,700, and the undersigned represents that said Adler pledge does not in any manner adversely affect said Account Receivable for \$50,700 and the collateral pledged as security therefor, other than as above set forth."

The three defendants, Altheimer, Brumley and Levin are successors to the Foreman Bank, Trustee, in the indenture of trust in connection with the \$600,000 collateral note issue.

Straus made defaults in the payment of the \$350,000 note to plaintiff and in the \$600,000 collateral note issue, the owners of which are represented by defendants, and in June 1931, Straus was placed in receivership by proceedings in the Federal Court.

Plaintiff Adler claims he is entitled to the \$49,000 involved in this suit by virtue of the assignment by Straus to him of Straus's interest in the surety bond, as mentioned in the collateral deposit agreement of April 29, 1930, and the assignment of May 1, 1930 executed by Straus to him, because on the trial there was more than \$232,000 still due and unpaid on the \$350,000 note and that the fair liberal cash market value of the balance of the

collateral, then in plaintiff's possession, not including the \$49,000 was \$60,600.

On the other hand, defendants' position as stated by their counsel, is that the surety bond "was a guarantee bond securing the primary obligation of the Sylvester Lewis Realty Co. It was collateral to the Realty Co.'s principal obligation to pay for the furniture installed in the Fairgrounds Park Hotel; and this principal obligation became an account receivable when Straus advanced the money to pay for that furniture."

There is evidence to the effect that Straus's books show an account between it and the Hotel Company and the ledger sheets are in evidence. Apparently these sheets show the "Account Receivable." Defendants' counsel further say "the assignment of the guaranty bond without the assignment of the underlying debt, the account receivable, vested in the transferee, Max Adler, mere naked legal title which he held for the benefit of the one holding the underlying obligation," and the argument seems to be that since Adler had a mere assignment of all the Straus interest in the surety bond, but no assignment of the "underlying debt, the account receivable", he is entitled to no part of the \$49,000, but on the contrary, since the "underlying debt, the account receivable", was assigned to the Foreman Bank, Trustee, defendants' predecessor, it is entitled to the \$49,000.

In support of these contentions a great many authorities are cited and discussed but we think they are wholly inapt. The collateral deposit and pledge agreement between Adler and Straus is clear and unambiguous. It specifically pledges the interest of Straus in the surety bond as part of the collateral to the \$350,000 note given by Straus to Adler. That document also provides that as long as Straus is not in default he may withdraw the interest of Straus in the surety bond upon payment of \$25,000. Two days

collateral, then the gift is preserved, but the donor is not to be bound by the gift, and the donee is not to be bound by the gift.

On the other hand, if the donor is bound by the gift, the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

the primary obligation of the donor is to the donee, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

collateral to the gift is the gift, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

the gift is not to be bound by the gift, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

primary obligation between the donor and the donee, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

advanced the money for the gift, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

There is a question as to the effect of the donee's promise to the donor, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

account between it and the donee, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

in evidence, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

Defendant's counsel further says the defendant is not to be bound by the gift, and the donor is not to be bound by the gift.

bond without the assignment of the underlying debt, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

receivable, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

title which he has in the bond of the donee, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

lying obligation, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

had a mere assignment of all the donee's interest in the gift, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

bond, but no assignment of the underlying debt, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

receivable, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

contrary, since the underlying debt, the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

assigned to the donee, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

it is entitled to the gift, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

In support of these positions a great many authorities are cited and discussed, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

collateral deposit for the purpose of the gift, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

is then not binding, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

of funds in the gift, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

\$200,000 have been given to the donee, and the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

that as long as the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

but of course the donee is not to be bound by the gift, and the donor is not to be bound by the gift.

after the surety bond was signed, May 1, 1930, Straus executed and delivered a formal assignment to Adler of its interest in the surety bond, which states the "assignment is given to Max Adler as part of the collateral to secure the payment of the note for \$350,000."

This document is likewise clear and unambiguous. More than four months thereafter, September 17, 1930, Straus executed to the Foreman Bank as trustee "that portion of the Account Receivable in the sum of \$75,700 not exceeding the sum of \$50,700 due from the undersigned to the Sylvester Lewis Realty Company. By that assignment Straus pledged among other things, as security with the bank, the surety bond in question, in which document it was expressly stated that "The undersigned represents that the surety bond in the principal sum of \$75,000, listed in the aforesaid collateral, has heretofore been pledged with other collateral to one Max Adler," and that it might be released upon payment of \$25,000 to Adler.

From this written document it is clear that all the interest of Straus in the surety bond was assigned to Adler as collateral security for the payment of the \$350,000. Of course, if the Hotel Company or the Surety Company had paid for installing the furniture and furnishings in the hotel, then the bond would have been of no force or effect, but when they failed to do this, the Surety Company was liable, and this has been adjudicated by the courts of Missouri. The fact that the physical possession of the bond was not turned over to Adler but was afterwards delivered to the Foreman Bank, as Trustee, we think can make no difference. Neither defendants nor their predecessor have suffered any loss because they have been unable to collect on the bond, because in the assignment to the bank by Straus, (from which we have above quoted) the bank was specifically advised that the bond had theretofore been pledged as collateral to Adler.

Defendants further contend that the surety bond was a chose in action and personal property within the Chattel Mortgage

Recording Act, and the failure of plaintiff to either take possession of the bond "or to record an instrument reciting that possession was being retained by the pledgor" in accordance with the Act, rendered the assignment and pledge void as against the Foreman Bank, as Trustee. Section 1 of chap. 95, Ill. Rev. Stats. 1937, provides that "No mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or *** the instrument is acknowledged and recorded *** and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage."

We think it clear that the pledging of Straus's interest in the surety bond, and the assignment of it to plaintiff do not fall within the provisions of the section. We think the bond was not personal property within the meaning of the act. It was an agreement made by the Hotel Company and the Surety Company that might ripen into an obligation and it was not intended by the legislature that such pledge or assignment should be recorded. National Live Stock Bank v. First National Bank, 203 U.S. 296; Cole v. Marple, 98 Ill. 58; Marsh v. Woodbury, 42 Mass. 436; Putnam v. White, 76 Me. 551.

Defendants further contend that the court erred in refusing to permit them "to amend their pleading to conform the pleadings to the proof already introduced." On the last day of the trial and when nearly all the evidence had been introduced, counsel for defendants asked leave to file an amendment to defendants' answer stating that if they were permitted to file the amendment they would have more testimony to offer, otherwise they would not offer any more. The amendment was tendered but leave to file was denied. In the proposed amendment defendants set up that the \$350,000 loaned to Adler was part of another transaction involving shares

...the fact, and the failure of the court to ...
possession of the land ...
possession was being ...
the act, rendered the assignment ...
Foreman Bank, as Trustee, Section 1 of Chap. 23, Ill. Rev. Stat.
1927, provides that "no mortgage, trust deed or other conveyance
of personal property having the effect of a mortgage or lien upon
such property, shall be valid as against the rights and interests
of any third person, unless possession thereof shall be delivered
to and remain with the mortgagee, or ... the instrument is com-
pleted and recorded ... not every such instrument ...
purposes of this act, be deemed a chattel mortgage."

We think it clear that the ...
in the equity bond, and the assignment of it to ...
fall within the provisions of the statute. ...
not personal property ...
assignment made by the ...
might ripen into an ...
legislation that such ...
National Live Stock & Horse Raisers' Ass'n v. ...
v. ..., 23 Ill. 2d ...
White, 78 Ill. 2d ...

Defendants further contend that the ...
to permit them to ...
to the fact already ...
and that nearly all the ...
defendants asked leave to ...
stating that if they were ...
would have the testimony ...
any more. The ...
In the proposed ...
located to ...

of stock and sought to have the two transactions interpreted as one; that part of the consideration for the \$350,000 loan was an agreement in connection with shares of stock. Defendants' answer to the complaint was filed November 6, 1935, and the proposed amendment was offered December 27, 1937, practically at the close of the evidence. We find no suggestion why this amendment was not offered sooner and are clearly of the opinion that the trial judge did not abuse his discretion in refusing to permit defendants to file the amendment.

The decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

McSurely, P.J., and Matchett, J., concur.

of stock and sought to have the same returned as
one; that part of the consideration for the stock was an
agreement in connection with the stock. Defendant's answer
to the complaint was filed November 3, 1935, and the proposed
amendment was offered December 7, 1935, principally at the close of
the evidence. We find no suggestion that the amendment was not
offered sooner and are clearly of the opinion that the trial
judge did not abuse his discretion in refusing to permit defendant
to file the amendment.
The decree of the Circuit Court of Cook County is affirmed.

DEC 15 1935

Respectfully, P. J., and H. J., J., Circuit.

298 I.A. 621

40353

SOUTH EAST NATIONAL BANK OF CHICAGO,
a national banking corporation,
(Petitioner) Appellee,

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and
corporate, et al.

CHARLES B. SCOVILLE, JR., as Trustee
of the Estate of Charles B. Scoville,
Deceased,
(Petitioner) Appellee.

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and corporate,
et al.

JOHN W. TAUCHEN,
(Respondent) Appellant.

No. 37C-9910

Consolidated
Under Cause
No. 37C-9910

No. 37C-14033

INTER-
LOCUTORY
APPEAL
FROM
CIRCUIT
COURT OF
COOK
COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeals in cases Nos. 40352, 40354, 40355 and 40356, and we have this day filed an opinion in the appeal of Waukesha Lime & Stone Company et al., Gen. No. 40352. The factual situation, reasons and conclusions stated in that opinion apply with equal force to the instant appeal.

For the reasons stated in the opinion in cause No. 40352 the order of the Circuit court of Cook county entered June 21, 1938, granting a temporary injunction is reversed.

ORDER REVERSED.

Sullivan and Friend, JJ., concur.

3331.A.621

40353

SOUTH EAST NATIONAL BANK OF CHICAGO,
a national banking corporation,
(Petitioner) Appellee,

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and
corporate, et al.

No. 333-1010

Consolidated
under cases
No. 333-1010

CHARLES B. BOVILL, Jr., as Trustee
of the Estate of Charles B. Bovill,
Deceased, (Petitioner) Appellee,

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and corporate,
et al.

No. 333-1010

JOHN W. BOVILL,
(Respondent) Appellant.

MR. PRESIDING JUDGE WILLIAM H. HARRIS, JR. OF THE COURT.

This appeal was consolidated for hearing with the appeals

in cases Nos. 40352, 40354, 40355 and 40356, and we have this day

filed an opinion in the appeal of American Time & Stone Company

et al., Gen. No. 40352. The factual situation, reasons and con-

clusions stated in that opinion apply with equal force to the

instant appeal.

For the reasons stated in the opinion in case No. 40352

the order of the Circuit Court of Cook County entered June 21,

1938, granting a temporary injunction is reversed.

JOHN HARRIS, JR.

HULLMAN and TRENK, JJ., concur.

40354

2
98 I.A. 621

SOUTH EAST NATIONAL BANK OF CHICAGO,
a national banking corporation,
(Petitioner) Appellee,

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and
corporate, et al.

CHARLES B. SCOVILLE, JR., as Trustee
of the Estate of Charles B. Scoville,
Deceased,
(Petitioner) Appellee,

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and corporate,
et al.

RALPH A. LEVIN,
(Respondent) Appellant.

No. 37C-9910

Consolidated
Under Cause
No. 37C-9910

No. 37C-14033

INTERLOCUTORY
APPEAL FROM
CIRCUIT COURT
OF COOK
COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeals in cases Nos. 40352, 40353, 40355 and 40356, and we have this day filed an opinion in the appeal of Waukesha Lime & Stone Company et al., Gen. No. 40352. The factual situation, reasons and conclusions stated in that opinion apply with equal force to the instant appeal.

For the reasons stated in the opinion in cause No. 40352 the order of the Circuit court of Cook county entered June 21, 1938, granting a temporary injunction is reversed.

ORDER REVERSED.

Sullivan and Friend, JJ., concur.

1921 A. 621

40384

SOUTH EAST NATIONAL BANK OF CHICAGO,
a national banking corporation,
(Petitioner) Appellee.

No. 370-3310

BOARD OF DIRECTORS OF THE CITY OF
CHICAGO, a body politic and
corporate, et al.

Consolidated
Under Cause
No. 370-3310

CHARLES E. BEVILLI, JR., as Trustee
of the Estate of Charles E. Bevilacqua,
Deceased,
(Petitioner) Appellee.

No. 370-14035

BOARD OF DIRECTORS OF THE CITY OF
CHICAGO, a body politic and corporate,
et al.

RALPH A. D. VINE,
(Respondent) Appellant.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeals

in cases Nos. 40382, 40383, 40384 and 40385, and we have this day

filed an opinion in the appeal of Arkansas Time & Store Company et al.

Gen. No. 40382. The factual situation, reasons and conclusions

stated in that opinion apply with equal force to the instant appeal.

For the reasons stated in this opinion in case No. 40382

the order of the Circuit Court of Cook County entered June 21, 1928,

granting a temporary injunction is reversed.

IT IS SO ORDERED.

William and Friend, Jr., counsel.

40355

293 I.A. 621³

SOUTH EAST NATIONAL BANK OF CHICAGO,
a national banking corporation,
(Petitioner) Appellee.

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and
corporate, et al.

CHARLES B. SCOVILLE, JR., as Trustee
of the Estate of Charles B. Scoville,
Deceased,
(Petitioner) Appellee.

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and
corporate, et al.

COMMERCIAL TRUST COMPANY et al.,
(Respondents) Appellants.

No. 370-9910

Consolidated
Under Name
No. 370-9910

No. 370-14033

INTRODUCTORY
APPEAL FROM
CIRCUIT COURT
OF COOK
COUNTY.

MR. PRESIDING JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeals in cases Nos. 40352, 40353, 40354 and 40356, and we have this day filed an opinion in the appeal of Waukesha Lime & Stone Company et al., Gen. No. 40352. The factual situation, reasons and conclusions stated in that opinion apply with equal force to the instant appeal.

For the reasons stated in the opinion in cause No. 40352 the order of the Circuit court of Cook county entered June 21, 1938, granting a temporary injunction is reversed.

ORDER REVERSED.

Sullivan and Friend, JJ., concur.



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40356

298 I.A. 621⁴

SOUTH EAST NATIONAL BANK OF CHICAGO,
a national banking corporation,
(Petitioner) Appellee,

v.

No. 37C-9910

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and corporate,
et al.

CHARLES B. SCOVILLE, JR., as Trustee
of the Estate of CHARLES B. SCOVILLE,
Deceased, (Petitioner) Appellee,

v.

Consolidated
Under Cause
No. 37C-9910

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and corporate,
et al.

CHICAGO CITY BANK AND TRUST CO. et al.
(Respondents) Appellants.

No. 37C-14033

INTRODUCTORY
APPEAL FROM
CIRCUIT COURT
OF COOK
COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeals in cases Nos. 40352, 40353, 40354 and 40355, and we have this day filed an opinion in the appeal of Waukesha Lime & Stone Company et al., Gen. No. 40352. The factual situation, reasons and conclusions stated in that opinion apply with equal force to the instant appeal.

For the reasons stated in the opinion in cause No. 40352 the order of the Circuit court of Cook county entered June 21, 1938, granting a temporary injunction is reversed.

ORDER REVERSED.

Sullivan and Friend, JJ., concur.

SOUTH EAST NATIONAL BANK OF CHICAGO,
a national banking corporation,
(Petitioner) vs. (Respondent)

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and corporate,
et al.

CHARLES B. McGOVERN, JR., as Trustee
of the Estate of CHARLES B. McGOVERN, JR.,
Deceased, (Petitioner) vs. (Respondent)

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO, a body politic and corporate,
et al.

CHICAGO CITY BANK AND TRUST CO. et al.
(Respondents) vs. (Petitioner)

No. 175-3510

Consolidated
Under Order
No. 40356-210

No. 375-14033

MR. JUSTICE: This case involves the rights of the court.

This appeal was consolidated for hearing with the appeals

in cases Nos. 40352, 40353, 40354 and 40355, and we have this day

filed an opinion in the appeal of Charles B. McGovern, Jr. and con-

et al., Gen. No. 40352. The factual situation, reasons and con-

clusions stated in that opinion apply with equal force to the

instant appeal.

For the reasons stated in the opinion in case No. 40352

the order of the Circuit Court of Cook County entered June 11, 1938,

granting a temporary injunction is reversed.

W. H. V. 1938

William and Friend, Jr., counsel

2021 A 621

40129

299 I.A. 621⁵

JOSEPH BRONARCZYK, executor
of the estate of ROBERT KARLO,
deceased,

Appellee,

v.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a corporation,
Appellant.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Joseph Bronarczyk, executor of the estate of Robert Karlo, deceased, brought suit on an insurance policy on the life of deceased issued by The Prudential Insurance Company of America, defendant herein, payable to the estate of insured. Trial was had before the court without a jury, resulting in judgment for plaintiff for \$559.18, from which defendant appeals.

The policy, bearing date December 25, 1933, was issued without a medical examination on the life of Robert Karlo, who was then fifty-one years of age. The policy provides that it shall not take effect if on the date thereof insured be not in sound health, but in such event the premiums paid thereon shall be returned. In his application for issuance of the policy Karlo was asked certain material questions, which, together with answers thereto, are as follows:

"17a. What is the present condition of health of life proposed? Answer: Good.

"17b. When last sick? Month. Year. Answer: Never.

"17c. Of what disease? Answer: None.

"18. Does any physical or mental defect or infirmity exist? Answer: No.

"19. Has life proposed ever suffered from consumption, asthma *** heart disease ***? Answer: No to all."

1931 A. 621

40122

JOSEPH BROTHMAN, executor
of the estate of ROBERT KARLO,
deceased,
v.
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a corporation,
Defendant.

MR. JUSTICE RANDALL: This is an appeal from the decision of the court.

Joseph Brothman, executor of the estate of Robert Karlo, deceased, brought suit on an insurance policy on the life of deceased insured by The Prudential Insurance Company of America, defendant herein, payable to the estate of insured. Trial was had before the court without jury, resulting in judgment for plaintiff for \$239.13, from which defendant appeals. The policy, bearing date December 23, 1923, was issued without a medical examination on the life of Robert Karlo, who was then fifty-one years of age. The policy provided that it shall not take effect if on the date thereof insured be not in sound health; but in such event the premium paid thereon shall be returned. In his application for issuance of the policy Karlo was asked certain material questions, which, together with answers thereto, are as follows:

"1. What is the present condition of health of life proposed? Answer: Good.
"2. When last sick? Month. Year. Answer: Never.
"3. Of what disease? Answer: None.
"4. Does any physical or mental defect or infirmity exist? Answer: No.
"5. Has life proposed ever suffered from consumption, asthma *** heart disease ***? Answer: No to all."

It is urged as ground for reversal that plaintiff cannot recover under the policy, because the undisputed evidence shows that the insured was not in sound health on the date of the policy, and particularly because defendant was induced to issue the policy by misrepresentation of material facts, amounting to fraud on the part of the applicant.

As bearing upon the state of Karlo's health, there is evidence that Dr. Edmund T. Bartkowiak had treated him in May, 1933. Karlo at that time complained of a cough and general weakness, and the physician recommended that he be sent to the Cook County Hospital. Karlo was admitted to the Hospital May 3, 1933, and discharged therefrom on June 7 following, and sent to the Psychopathic Hospital. When he entered the Cook County Hospital Dr. David C. Lerner, an interne, took his history and ~~made~~ a physical examination which revealed an enlargement of the heart and liver and a swelling of the ankles. Dr. Lerner stated that these symptoms were indicative of a heart which had broken down, and characterized his condition as cardiac decompensation. In the history given to Dr. Lerner, Karlo stated that he drank about a pint of alcohol daily. The interne described Karlo's decompensated heart as a serious disease. Another interne, Dr. Alex B. Nagins, examined Karlo in May, 1933, when he entered the Cook County Hospital. He found that his heart and liver were enlarged, and that there was an edema of the knees. He explained the latter as a condition showing ~~swelling~~limbs, resulting from the heart ailment, produced by an enlarged heart due to high blood pressure.

The hospital records, which were admitted in evidence upon the hearing, show that Karlo's condition when discharged in June, 1933, was about the same as when he entered the hospital. He had a swelling of the ankles of some months' standing, pain in both legs, loss of appetite, nervousness and a cough, all of several months' duration. The diagnosis as shown by the examination and history

It is urged as ground for recovery that plaintiff cannot recover under the policy, because the stipulated evidence shows that the insured was not in sound health on the date of the policy, and particularly because defendant was induced to issue the policy by misrepresentation of material facts, amounting to fraud on the part of the applicant.

As bearing upon the state of Karlo's health, there is evidence that Dr. Edmund T. Bartkowski had treated him in May, 1933. Karlo at that time complained of a cough and general weakness, and the physician recommended that he go to the Cook County Hospital. Karlo was admitted to the Hospital May 3, 1933, and remained there from June 7 following, and went to the Rockefeller Hospital, then he entered the Cook County Hospital, Dr. David C. Lerner, an internist, took his history and made a physical examination which revealed an enlargement of the heart and liver and a swelling of the ankles. Dr. Lerner stated that these symptoms were indicative of a heart which had broken down, and characterized his condition as cardiac decompensation. In the history given to Dr. Lerner, Karlo stated that he drank about a pint of alcohol daily. The internist described Karlo's decompensation as a serious disease. Another internist, Dr. Alex B. Legins, examined Karlo in May, 1933, when he entered the Cook County Hospital. He found that his heart and liver were enlarged, and that there was an edema of the knees. He explained the latter as a condition known as swelling of the feet, resulting from the heart ailment, produced by an enlarged heart due to high blood pressure. The hospital records, which were admitted in evidence upon the hearing, show that Karlo's condition soon disappeared in June, 1933, was about the same as when he entered the hospital. He had a swelling of the ankles of some morning, standing, pain in both legs, loss of appetite, nervousness and a cough, all of several months' duration. The diagnosis as shown by the examination and history

was arterioschlerotic heart disease, in mild decompensation, myocardial degeneration. After being in the hospital for over a month Karlo became irrational and was sent to the Psychopathic Hospital. He died November 5, 1934, less than a year after the policy was issued. Upon the trial defendant made a tender of \$38.37, representing the premiums paid on the policy, plus interest, which was refused by plaintiff's attorney, and judgment was thereupon entered in favor of plaintiff.

The application for insurance was made about six months after Karlo had been under observation and had received treatment in the Cook County Hospital in May and June, 1933, and it is reasonably certain that in December of that year he was still afflicted with the disease from which he died a year later. However, in his application he denied having any serious disease, and in response to the interrogatories hereinbefore set forth he specifically answered that when application was made the condition of his health was good, that he had never been sick, that he had no physical or mental defect or infirmity, and that he had never suffered from heart disease. Obviously, if the insurance company had been told the facts disclosed by the evidence it would have had an opportunity to investigate the hospital records, which would have revealed the serious condition of Karlo's health while in the hospital, a short time before he applied for the policy, and in the light of all the information to which it was entitled, the company could then have decided upon the application on the basis of all the facts. Whether or not Karlo was aware of the serious state of his health shortly prior to the application for insurance, it is apparent from the record that he was not in sound health at the time the policy was issued. The law is well settled that an insurance company has a right to the truth and that the utmost good faith is required by the applicant for an insurance policy.

Plaintiff's counsel argue that by the terms of the policy

was atherosclerotic heart disease in this decomposition, myocardial degeneration. It is held in the hospital for over a month Kario became irascible and was sent to the Psychiatric Hospital. He died November 8, 1934, less than a year after the policy was issued. Upon the trial defendant made a tender of \$38.37, representing the premiums paid on the policy, plus interest, which was refused by plaintiff's attorney, and judgment was thereupon entered in favor of plaintiff.

The application for insurance was made about six months after Kario had been under observation and had received treatment in the Cook County Hospital in July and June, 1933, and it is not only certain that in December of that year he was still afflicted with the disease from which he died a year later. However, in his application he denied having any serious disease, and in response to the interrogatories hereinbefore set forth he specifically answered that when application was made the condition of his health was good, that he had never been sick, that he had no physical or mental defect or infirmity, and that he had never suffered from heart disease. Obviously, if the insurance company had been told the facts disclosed by the evidence it would have had an opportunity to investigate the hospital records, which would have revealed the serious condition of Kario's health while in the hospital, a short time before he applied for the policy, and in the light of all the information to which it was entitled, the company could then have decided upon the application on the basis of all the facts. Whether or not Kario was aware of the serious state of his health shortly prior to the application for insurance, it is apparent from the record that he was not in sound health at the time the policy was issued. The law is well settled that an insurance company has a right to the truth and that the utmost good faith is required by the applicant for an insurance policy.

Plaintiff's counsel argued that by the terms of the policy

the application for insurance was not a part of the contract. Although the application was not attached to the policy, it clearly formed the basis for the contract of insurance, and undoubtedly the representations made were the inducement for the issuance of the policy. The law in this state is well settled that an application, even though not attached to the policy, is admissible in evidence where fraud is charged. In Supreme Council v. Beggs, 110 Ill. App. 139, where a similar contention was made, the court said that the extrinsic evidence contained in the application was admissible to prove charges of fraud and deceit which induced defendant to enter into the contract, and the court made the pertinent observation that if this were not the law, it would practically oust the courts of jurisdiction to inquire whether written contracts were induced and obtained by fraud, because the fraud rarely, if ever, appears on the face of the instrument. We also recently held, in Spudeas v. National Life & Acet. Ins. Co., 287 Ill. App. 602, that the trial court properly admitted the application for insurance in evidence.

Plaintiff's counsel further contend that a provision in a life insurance policy that no obligation is assumed by the company prior to the date thereof, nor unless on said date the insured is alive and in sound health, merely means that the applicant must not have contracted a disease between the date of the application and the issuance of the policy, and that the provision does not apply to a condition that existed prior to and at the time of making the application. The several cases cited by plaintiff in support of this contention were all based upon policies issued pursuant to a medical examination. In James v. National Life & Accident Ins. Co., 265 Ill. App. 436, one of the cases cited by plaintiff, the defendant waived all defenses except nonfulfillment of the preliminary provisions of the policy, and no fraud was charged as in the case at bar. Johnson v. Royal Neighbors, 253 Ill. 570, involved a situation where the

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Although the application was not at all unusual, it was

forwarded the back for the contract of insurance, and accordingly

policy. The law in this state is well settled that an individual's

even though not attached to the policy, is available in this case.

extrinsic evidence contained in the file is inadmissible to

into the contract, and the same was the permanent obligation

that if this were not the law, it would be a very serious matter to the Government of the United States.

and obtained by him, because the first party, it says, was on the face of the instrument, a like was only held, in the case

...not properly limited the ...

...the Commission's policy that no official action is taken by the company

alive and in sound health, namely means that the applicant must not
prior to the date thereof, nor unless on a date the insured is

the issuance of the policy, and that the provision does not apply to the insured if the insured has not been contacted a disease between the date of the application and

to a condition that existed prior to and at the time of making the application. The several cases cited by applicant in support of this

Isolates of the following bacterial species were found in the water samples:

pp. 486, one of the cases cited by Linnell; the other three wives

... involved a situation where the policy, and no change as in the case of Mr. Johnson

applicant had answered the questions truthfully but the agent wrote untrue answers therein. The circumstances of that case are not at all analogous to the facts at bar, because in the instant proceeding the agent asked Karlo all the questions on the application, and the answers were written in as given by the applicant, who thereafter signed the application. There is evidence that the agent who propounded the questions to Karlo did not know that he was suffering from disease or that he had been under the prior care of a physician, and he said that if he had known these facts he would not have submitted the application.

Another case relied upon by plaintiff is Walsh v. Prudential Insurance Company of America, 285 Ill. App. 226. The Appellate court in a subsequent opinion, filed in Fortuna v. Prudential Insurance Company, 287 Ill. App. 620, said that after giving the Walsh case respectful consideration, "we are satisfied that it is at variance with the Tomasun case (Western & Southern Life Insurance Company v. Tomasun, 358 Ill. 496), which is the most recent expression of our Supreme court on the subject," and thereby in effect overruled the conclusions reached in the Walsh case.

After considering the evidence and the contentions made by the respective parties, we have reached the conclusion that plaintiff cannot recover under this policy because the defendant was induced to issue the policy through the fraudulent representations of Karlo as to the state of his health, and also because the condition precedent contained in the policy, namely, the sound health of applicant, did not exist. As to the first reason, the law is well settled that an applicant for life insurance is not exempted from the operation of the ordinary rules of common honesty and good faith in his dealings with the company in procuring a policy (Tanner v. Prudential Insurance Company, 283 Ill. App. 210, and in furnishing data which constitutes the basis for a decision on the part of the company as to whether

applicant had and used the same truthfully for the agent wrote untrue answers thereto. The circumstances of that case are not at all analogous to the facts at bar, because in the instant proceeding the agent asked Kario all the questions on the application, and the answers were written in as given by the applicant, who thereafter signed the application. There is evidence that the agent who procured the questions to Kario did not know that he was suffering from disease or that he had been under the prior care of a physician, and he said that if he had known those facts he would not have submitted the application.

Another case relied upon by plaintiff is Wright v. Prudential Insurance Company of America, 283 Ill. App. 286. The appellate court in a subsequent opinion, filed in Wentworth v. Prudential Insurance Company, 287 Ill. App. 630, said that after giving the weight case respectful consideration, "we are satisfied that it is at variance with the Townsend case (Eastern & Southern Life Insurance Company v. Townsend, 288 Ill. 486), which is the most recent expression of our supreme court on the subject," and thereby in effect overruled the conclusions reached in the Kario case.

After considering the evidence and the conclusions made by the respective parties, we have reached the conclusion that plaintiff cannot recover under this policy because the defendant was induced to issue the policy through the fraudulent representations of Kario as to the state of his health, and also because the condition precedent contained in the policy, namely, the sound health of applicant, did not exist. As to the first reason, the law is well settled that an applicant for life insurance is not exempted from the operation of the ordinary rules of common honesty and good faith in his dealing with the company in procuring a policy (Townsend v. Prudential Insurance Company, 283 Ill. App. 210, and in furnishing data which constitutes the basis for a decision on the part of the company as to whether

or not it will issue the policy, the applicant must answer questions truthfully so as to put the insurance company in possession of all the facts and enable it to make an investigation and decision whether it wishes to insure the applicant. (Stipoich v. Metropolitan Life Insurance Company, 277 U. S. 311.)

As to the second reason, we consider the case of Western & Southern Life Insurance Company v. Tomasun, 358 Ill. 496, as the latest expression of the law in this state, and therefore controlling. We have frequently had occasion to pass upon the rule laid down in the Tomasun case, and as recently as in the case of Gorgen v. Continental Casualty Company, 296 Ill. App. 608, wherein petition for leave to appeal was denied by the Supreme court said: "Regardless of whatever conflict there has been in the authorities of this or other jurisdiction on the question of what character of misrepresentations will avoid insurance policies, the law has been settled in this state in Western & Southern Life Ins. Co. v. Tomasun, 358 Ill. 496, that material misrepresentations, even though honestly or ignorantly made, will void a policy of insurance."

Plaintiff's counsel seek to distinguish the Tomasun case from the proceedings in the case at bar, on the ground that the Tomasun case was an action in equity for the cancellation of a policy, whereas the instant suit is one at law. This contention was likewise made in Gorgen v. Continental Casualty Company, supra, and was disposed of by the Appellate court by saying "we think that the conclusion reached (in the Tomasun case) was intended by the Supreme court to be equally applicable to actions at law."

The representations made by Karlo in this proceeding materially affected both the acceptance of the risk and the hazard assumed by the company, and it is inconceivable that Karlo did not know that he had been sick, after spending more than a month in the Cook county hospital, where his condition was diagnosed as a serious heart ailment.

or not it will issue the policy, the applicant must show that the
 terms truthfully so as to put the insurance company in possession
 of all the facts and enable it to make an investigation and decision
 whether it wishes to issue the applicant. (Whitcomb v. Whitcomb)
Life Insurance Company, 277 U. S. 311.

As to the second reason, we consider the case of Western
Southern Life Insurance Company v. Tennessee, 358 U. S. 359, as the
 latest expression of the law in this state, and the effect controlling.
 We have frequently had occasion to refer upon the same point in
 the Tennessee case, and as recently as in the case of Johnson v.
Continental Casualty Company, 362 U. S. 446, wherein we held for
 leave to appeal was granted by the Supreme Court said: "The fact
 of whatever conflict there has been in the holdings of the
 other jurisdiction on the question of what character of representa-
 tions will avoid insurance policies, the law has been settled in
 this state in Whitcomb v. Whitcomb, 277 U. S. 311,
1928, that the right of representation, stated in Whitcomb, is ex-
 treme and made, still holds a policy of insurance."

Whitcomb's contract was to be issued in the Tennessee case from
 the proceeding in the case at bar, on the ground that the Tennessee
 case was an action in equity for the cancellation of a policy, whereas
 the instant suit is one at law. This contention was rejected in
Johnson v. Continental Casualty Company, 362 U. S. 446, and was disposed of by
 the appellate court by saying "we think that the contention advanced
 (in the Tennessee case) was intended by the Supreme Court to be equally
 applicable to actions at law."

The respondents made by law in this proceeding partially
 effect both the acceptance of the risk and the return of the
 company, and it is inconceivable that Whitcomb did not know that
 he had been sick, after spending more than a month in the Cook County
 hospital, where his condition was diagnosed as a serious heart ailment.

Since the case was tried by the court without a jury, it will serve no useful purpose to remand the same for another trial. Therefore, the judgment of the Municipal court is reversed.

JUDGMENT REVERSED.

Burke, P. J., and Sullivan, J., concur.

Since the two were not in a position to
it will serve no useful purpose to repeat the case for another
trial. Therefore, the judgment of the Municipal Court is reversed.
JUDGMENT REVERSED.

Burke, P. J., and Sullivan, J., concur.

40366

PEOPLE OF THE STATE OF
ILLINOIS,

Appellant,

v.

PATRICK P. DWYER,

Appellee.

APPEAL FROM CRIMINAL
COURT, COOK COUNTY.

298 I.A. 621⁶

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On March 23, 1938, the criminal court granted Patrick P. Dwyer, defendant herein, a new trial in the cause entitled "People v. Patrick P. Dwyer, Indictment No. 39065." Upon the filing of a petition by the People in this court, an order was entered October 11, 1938, for leave to appeal from that order.

Defendant was tried and convicted in the criminal court April 14, 1926, under an indictment charging robbery while armed with a dangerous weapon, and sentenced to the state penitentiary for from ten years to life. He sued out a writ of error to the Supreme court, the conviction was sustained and judgment affirmed February 16, 1927, in People v. Dwyer, 324 Ill. 363, and he has since been confined in the state penitentiary.

December 28, 1937, Dwyer filed a verified petition in the nature of a writ of error coram nobis, under section 72 of the Civil Practice act (chap. 110, Illinois Revised Stats. 1937), the material portions of which are as follows:

"Your petitioner, Patrick P. Dwyer, in his own proper person, and by James M. Burke, Thomas J. McCormick and Gene J. Giacomelli, his attorneys, respectfully represent unto this Honorable Court, that petitioner is illegally detained and confined in the Illinois State Penitentiary at Joliet, Illinois, and held by virtue of a certain mittimus issued out of the Criminal Court of Cook County founded and based upon a defective, illegal and void judgment entered on the fourteenth (14th) day of April, A. D. 1926, before His Honor, Judge William N. Gemmill, now de-

40365

PROVINCE OF THE STATE OF
ILLINOIS

Applicant,

vs.

Respondent.

2981.A.621

Appellee.

MR. JUSTICE ...

On March 23, 1938, the criminal court granted Patrick P. Dwyer, defendant herein, a new trial in the case entitled "People v. Patrick P. Dwyer, Indictment No. 39063." Upon the filing of a petition by the people in this court, an order was entered October 11, 1938, for leave to appeal from that order.

Defendant was tried and convicted in the criminal court April 14, 1936, under an indictment charging robbery with a dangerous weapon, and sentenced to the state penitentiary for from ten years to life. He was out a writ of error to the supreme court, the conviction was sustained and judgment affirmed February 16, 1937, in People v. Dwyer, 324 Ill. 363, and he has since been confined in the state penitentiary.

December 28, 1937, Dwyer filed a verified petition in the nature of a writ of error coram nobis, under section 12 of the Civil Practice act (chap. 110, Illinois Revised Laws, 1937), the material portions of which are as follows:

"Your petitioner, Patrick P. Dwyer, in his own proper person, and by James W. Burke, Thomas J. McCormick and Gene A. Gismelli, his attorneys, respectfully represent unto this Honorable Court, that petitioner is illegally detained and confined in the Illinois State Penitentiary at Joliet, Illinois, and held by virtue of a certain writtens issued out of the Criminal Court of Cook County founded and based upon a defective, illegal and void judgment entered on the fourteenth (14th) day of April, A.D. 1936, before His Honor, Judge William W. Gismelli, now deceased."

ceased, who was at that time Judge of the Superior Court of Cook County and ex-officio Judge of the Criminal Court of Cook County, and holding said Criminal Court.

"Your petitioner, further respectfully represents that on January 20, 1926, an indictment was returned by the Grand Jury of Cook County, charging your petitioner with robbery while armed with a deadly weapon, and alleged that on December 20, 1925, the defendant (your petitioner) did make an assault upon one John Wilson, and by force and violence did rob, steal, take and carry away the sum of Two Dollars (\$2.00); that after said indictment was returned, defendant retained one Herzog, an attorney at law, duly licensed to practice in the State of Illinois, as his attorney, to represent him and to conduct his defense in said proceeding; that the fees of the said Mr. Herzog were paid to him by the defendant, and that the said Mr. Herzog filed his appearance as defendant's attorney with the Clerk of the Criminal Court of Cook County and said appearance was filed of record on March 30, 1926; that the cause was called before His Honor, Judge Gemmill, on March 2, 1926, and was ordered continued until March 18th, 1926; that on March 19th, 1926, the cause was again ordered continued until March 31, 1926, and that at that time the defendant was arraigned on said indictment and entered a plea of not guilty, and that said plea was entered and filed of record in said court and that the cause was then ordered continued and set for trial on April 12, 1926, and that when said cause was called for trial on the 12th day of April, 1926, the court summarily ordered that the defendant be taken back into custody, without entering any order continuing said cause, and that on the 14th day of April, 1926, without notice to the defendant or his attorney the defendant was taken before the court and placed on trial; that at that time the defendant protested that neither he or his lawyer were notified or knew that the cause was coming to trial, but the court notwithstanding his protest, and without his consent, and without notice to his attorney, appointed an attorney, one James J. Barbour, to represent him, notwithstanding the fact that the defendant had employed and paid an attorney and that said attorney had prepared his defense; and that said attorney had filed his appearance, and that said appearance was still on file at the time of the appointment of the said Barbour; that the defendant did not know or did not consult with or did not authorize the said James J. Barbour to represent him; neither did he give any authority to the said James J. Barbour to represent him; neither did he authorize the said James J. Barbour to file his appearance in his behalf, and that he at no time made any representations to the court that he was without funds to employ counsel; that there is no order of court entered substituting the said James J. Barbour as his duly authorized attorney; that there is not and never was any petition on file requesting or no order permitting his said attorney Herzog to withdraw from said case and substituting the said Barbour in his place and stead; neither did his attorney associate himself with or authorize the said James J. Barbour to represent him, but the court on its own motion, without notice to defendant or his attorney of record compelled the defendant to proceed to trial after appointing the said Barbour as his attorney, but the said James J. Barbour did not represent him during said trial; that a jury was impanelled and sworn, testimony was taken of state's witnesses without cross-examination, no evidence was introduced on behalf of the defendant and that the defendant was found guilty; that there was a judgment entered on the verdict of the jury and the defendant was sentenced to the Illinois State penitentiary for a period of ten years to life, that a mittimus was issued out of said court and defendant was incarcerated in said penitentiary where he still remains.

"Your petitioner further respectfully represents that the said James J. Barbour was not empowered to act as his attorney on a motion for a new trial or in arrest of judgment, and did not appear and so act, nor did any other attorney appear and so act.

"Your petitioner further respectfully represents unto this Honorable Court, that immediately upon the return of said verdict and prior to the rendition of the judgment of said verdict the defendant protested in open court that he did not receive a fair trial, in that he was denied the right of counsel to cross-examine the state's witnesses and to present his defense to the charges contained in said indictment.

"Your petitioner further respectfully represents to this Honorable Court that at no time did the said James J. Barbour function as the defendant's attorney and that on August 1, 1936, he, the said James J. Barbour wrote a letter to the Board of Pardons of the State of Illinois, which is in words and figures as follows:

'Aug. 1, 1936.

Honorable Board of Pardons,
Springfield,
Illinois.

In the matter of Patrick Dwyer #595-E-Joliet.
Gentlemen:

I have been asked by Mr. J. J. McCarthy, counsel for Mr. Dwyer, to correct an error in the common law record in Dwyer's case whereby it appears that I represented Dwyer on the occasion of his hearing before Judge Gemmill when he was sentenced.

The fact is that I at no time represented Dwyer. I was present in court when Dwyer's case was called but I was representing an entirely different party. Judge Gemmill told Dwyer that he would assign me to represent Dwyer, but the latter did not know who I was and told the court that he did not care to have me represent him. As I recall Dwyer told the court that he had paid another attorney and that he wanted that attorney present. Whether this be so or not I had nothing to do with Dwyer's case, and my impression was at the time that Judge Gemmill made Dwyer proceed with his defense either without counsel or in a summary manner; which caused Mr. Dwyer to feel at the time, and to ever since be of the opinion that he was not accorded a fair hearing.

I sincerely hope that the mistaken impression that I represented Dwyer and that he had a full defense through such representation will be corrected so far as the records of your department are concerned, and that the Board will give further consideration to Mr. Dwyer's plea in the light of the statement which I am submitting you.

Very truly yours,

JJB:SEM

James J. Barbour.'

"Your petitioner further respectfully represents that he was improperly and unlawfully placed on trial, and that the judgment entered is null and void because he had no notice, nor did his attorney have any notice of the proceedings on April 14, 1926, and the procuring of the judgment without any notice of trial to the defendant or his attorney denied your petitioner his right to a fair trial; that the appointment of James J. Barbour in the place and stead of his duly authorized attorney, without notice and without the request, knowledge or consent of the defendant was a void order and prevented him from making a proper defense and that by being forced to trial without the benefit of any counsel was a denial of the rights

"Your petitioner further respectfully represents that the said James T. Gordon was not empowered to act as his attorney on a motion for a new trial or in trial of judgment, and did not appear and so act, nor did any other attorney appear and so act.

"Your petitioner further respectfully represents that the Honorable Court, that immediately upon the return of said verdict and prior to the rendition of the judgment of said court the defendant protested in open court that he did not receive a fair trial, in that he was denied the right of counsel to cross-examine the witnesses and to present his defense to the charges contained in said indictment.

"Your petitioner further respectfully represents to this Honorable Court that at no time did the said James T. Gordon function as the defendant's attorney, and that in April 1, 1936, he, the said James T. Gordon wrote a letter to the Board of Prisoners of the State of Illinois, which is in words as follows:

April 1, 1936.

Honorable Board of Prisoners,
Joliet,
Illinois.

In the matter of Patrick Dwyer, No. 1-10111.

Gentlemen:

I have been asked by Mr. J. T. Gordon, counsel for Mr. Dwyer, to correct an error in the common law report in Dwyer's case whereby it appears that I represented Dwyer on the occasion of his hearing before the Board of Prisoners. I am sorry to say that I do not remember the occasion, but I was present in court when Dwyer's case was called and I was representing an entirely different party. Judge Campbell told Dwyer that he would assign me to represent Dwyer, but the latter did not know me and I was not present. He did not come to have me represent him. As I recall, Judge Campbell told the court that he had assigned me to represent Dwyer, and that he wanted that attorney present. In that case he so or not I had nothing to do with Dwyer's case, and my impression was at the time that Judge Campbell made Dwyer present with his defense either without counsel or in a summary manner; which caused Mr. Dwyer to feel at the time, and to ever since be of the opinion that he was not accorded a fair hearing.

I sincerely hope that the misimpression that I represented Dwyer and that he had a full hearing when in such representation will be corrected as far as the records of your Department are concerned and that the Board will give further consideration to Mr. Dwyer's case in the light of the statement which I am submitting you.

Very truly yours,
James T. Gordon.

JTB:WM

"Your petitioner further respectfully represents that he was improperly and unlawfully placed on trial, and the judgment entered is null and void because he had no notice, nor did his attorney have any notice of the proceedings on April 1, 1936, and the granting of the judgment without any notice of trial to the defendant or his attorney, denied your petitioner the right to a fair trial. That the appointment of James T. Gordon in the place and stead of his attorney as attorney, without notice and without the consent of the defendant or his attorney, was a void act and prevented him from making a proper defense and is a denial of his rights without the benefit of any counsel and a denial of the rights

guaranteed him by the provisions of the Constitution of the United States and the State of Illinois and that he was and is imprisoned without due process of law.

"Your petitioner further shows that on January 16, 1931, a motion was entered supported by petition, before His Honor Judge John P. McGoorty in the Criminal Court of Cook County to amend the record and vacate the judgment; that on the 16th day of October, 1931, there was hearing on the petition to amend the record and the motion was denied and defendant was given ninety days to prepare and file a bill of exceptions, and that no further action was taken in this behalf.

"Your petitioner further respectfully shows that Mr. Herzog, his duly authorized attorney never withdrew his appearance as attorney for your petitioner, either by his client's consent or by the Court's permission; neither was he ever requested to withdraw his appearance, either by the petitioner or by the court, neither did your petitioner have any notice either express or implied, from any source whatsoever that his case was coming to trial on April 14, 1926, notwithstanding the fact that when his case came up on April 12, 1926, he was informed by the clerk of the court that he would receive due notice as to when the case would again come up for trial.

"Your petitioner further respectfully represents unto this Honorable Court that he is not guilty of the crime charged in the indictment; that he had a good, sufficient and valid defense, conclusive of his innocence; that through no negligence or lack of diligence on his part or on the part of his attorney he was prevented from presenting this defense and that if the court was acquainted with and had knowledge of the facts constituting his defense it would not have rendered judgment on the verdict of the jury.

"Your petitioner further respectfully shows unto this Honorable Court that he retained an attorney to conduct his defense, that he and his attorney prepared his defense; that the attorney never withdrew his appearance; that the appearance of the said James J. Barbour was never authorized or was never filed in court; but on the contrary, notwithstanding the court's summary action in the appointment of Mr. Barbour without your petitioner's consent, or without the consent of Mr. Barbour, the said Mr. Barbour did not represent him; neither was Mr. Barbour in court, nor was your petitioner in court when the said appointment was made; and that neither Mr. Barbour nor any other lawyer functioned in any manner, shape or form as the defendant's attorney during said trial, with the result that facts establishing the defendant's innocence were concealed from the court.

"Your petitioner further respectfully represents unto this Honorable Court that at the time of the rendition of the judgment he was under duress; that since said time he has been and is incarcerated in the penitentiary; that his imprisonment is unlawful and constitutes duress; that as a result of his imprisonment he has been without funds to employ counsel; that he is about sixty-four years of age; an inmate of the prison hospital suffering from diabetes; and that as a result of said duress he has heretofore been prevented from seeking the relief prayed for in this petition.

"Your petitioner further respectfully moves the court to enter an order directing that a hearing be had on this petition to the end that the errors of fact herein complained of be determined and corrected, that the judgment hereinbefore rendered be vacated; the mittimus quashed and your petitioner ordered discharged from custody."

In January, 1938, Dwyer's counsel, by leave of court, filed an amended petition setting forth in substance that Dwyer was a material witness in his own behalf; that he was then in the custody of Joseph Hagen, Warden of the Illinois State Penitentiary at Joliet, and that his counsel would be unable to produce him as a witness on the trial by ordinary process of law; and praying that a writ of habeas corpus ad testificandum be directed to the warden, commanding him to have Dwyer before the court on the day set for the hearing of the original petition.

The court ordered the People to answer and plead to the petition and amended petition within a short date, and in obedience to that order a motion to dismiss the petition was filed by the People, which, omitting the formal portions, reads as follows:

"Otto Kerner, Attorney General of the State of Illinois, and Thomas J. Courtney, State's Attorney for Cook County, Illinois, who prosecute for the People of the State of Illinois in that behalf, as to the petition or motion of Patrick P. Dwyer, by him above pleaded, move the Court to dismiss said petition or motion for the following reasons, to-wit:

"1. That the motion or petition filed on the 5th day of January, 1938, is too late, as the statute of limitations in petitions or motions in the nature of a writ of error coram nobis is five years, and the defendant, Patrick P. Dwyer, was convicted in the Criminal Court of Cook County on the 14th day of April, 1926;

"2. That the defendant, Patrick P. Dwyer, sued out a writ of error to the Supreme Court and the conviction was sustained and judgment affirmed on the 16th day of February, 1927, in the case entitled The People of the State of Illinois v. Patrick P. Dwyer, Volume 324 Illinois, page 363; that a convict has his choice between a writ of error and a writ of error coram nobis, but he cannot have both; that the matter is res adjudicata, and all questions raised on writ of error and all questions that could have been raised are finally adjudicated and the Criminal Court of Cook County, Illinois, has lost jurisdiction. Respondent further says that before filing a motion or petition in the nature of a writ of error coram nobis to attack a judgment in a Criminal Court case after affirmance thereof by the Supreme Court, application should be made to the Supreme Court for leave to file the petition in the trial court;

"3. Respondent further says that the Supreme Court retains jurisdiction of the causes adjudicated by it for all time, for the purpose of preserving, protecting and enforcing its judgments, decrees and determinations;

"4. As to the defendant's allegation in paragraph 2 'that on the 14th day of April, 1926, without notice to the defendant or his attorney, the defendant was taken before the court and placed

The hearing of the original petition.

commanding him to have the before the court on the day set for
a writ of habeas corpus and testific might be directed to the witness,
a witness on the trial by ordinary process of law; and praying that
at latest, and that his counsel would be unable to produce him as
cousin of Joseph Brown, brother of the Illinois State Senator,
was a material witness in his own behalf; that he was then in the
filing an amended petition - telling forth in the same what lawyer
In January, 1908, my firm coun- ed by leave of court,

People, which, omitting the word "notion", reads as follows:
to that certain motion to dismiss the petition was filed by the
petition and same was withdrawn within a short time, and no objection
The court ordered the people to withdraw said petition and file

above stated, were the ones to claim that a station or station
or the following reasons, to-wit:

[illegible][illegible]

"3. Respondent further says that the Supreme Court regarding jurisdiction of the court was decided by it for all time, for the purpose of preserving, protecting and enforcing its judgments, decrees and decisions;

"4. As to the bond which was taken from the defendant on the 18th day of July, 1906, without notice to the defendant or his attorney, the defendant claims that he was not placed

on trial, that at that time the defendant protested that neither he or his lawyer were notified or knew the cause was coming to trial, but the Court, notwithstanding his protest and without his consent and without notice to his attorney, appointed an attorney, one James J. Barbour, to represent him; respondent says that it is apparent from this quotation that the Court knew of defendant's contention and therefore it would not be an error of fact of which the Court did not know; that notice to an attorney or a defendant in a criminal case is a matter of courtesy and not a matter of law; that it is the duty of the defendant and his attorney to ascertain the time of trial, and, since the attorney who had been employed, if he was employed by the defendant, was not present in court at the time of the hearing, it was within the authority of the Court to appoint competent counsel to defend him;

"As to the further allegation in paragraph 2, where the defendant complains that his case was continued from April 12th to April 14th without any formal entry of a continuance, respondent says that this a matter apparent on the face of the record and writ of error coram nobis does not extend to matters apparent on the face of the record;

"5. As to paragraphs 3 and 4, where the defendant complains that James J. Barbour did not file a motion for a new trial or in arrest of judgment, nor did any other attorney so act, respondent says that this is not an error of fact since it is apparent on the face of the record; that it is very strange and would make any one inquire why, if the defendant did employ counsel, he did not have him file a motion for a new trial or in arrest of judgment. The defendant was found guilty by a jury and sentenced by the court in the regular way;

"As to defendant's allegation that 'the defendant protested in open court that he did not receive a fair trial in that he was denied the right of counsel to cross-examine the State's witnesses and present his defense,' respondent says that this would not be an error of fact of which the Court did not know, since the defendant makes this admission that he protested in open court, so it is apparent that the court was cognizant of all the facts;

"6. As to paragraph 5, where the defendant alleges that James J. Barbour wrote a letter to the Pardon Board on August 1, 1936, ten years after he had been appointed by Judge Gemmill to defend Patrick P. Dwyer, attempting to deny the fact, which is a matter of record in the Criminal Court of Cook County, that he was appointed and participated in the defense of the defendant, respondent says that the record imports verity and cannot be affected by a letter or an affidavit or any such minor proceedings;

"7. In answer to paragraph 6 of defendant's petition, respondent says that defendant's constitutional rights were protected; that the Court appointed competent counsel for him and had every right to do so, since his case was continued several times at his request, and if he did employ counsel it was counsel's business to be at the hearing and to ascertain the date of the hearing;

"8. In answer to paragraph 7 of defendant's petition, respondent says that defendant filed a motion to correct and amend the record and vacate the judgment in the above entitled cause on January 16, 1931, which matter was heard by the Honorable John P. McGorty, Judge of the Superior Court and ex-officio Judge of the Criminal Court of Cook County, on the 16th day of October, 1931, and that the motion was denied and the defendant was given ninety

on trial, it is that time the defendant was notified of his right to counsel, and he was advised that if he could not afford a lawyer, one would be appointed for him before any proceedings took place. He was also advised that he had the right to stop proceedings at any time. He was not asked to sign any statement, and he was not asked to sign any waiver of his rights. He was not asked to sign any statement, and he was not asked to sign any waiver of his rights. He was not asked to sign any statement, and he was not asked to sign any waiver of his rights.

and to the further information in 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2

"5. As to paragraphs 3 and 4, where the defendant complains that James T. Harcourt did not file a motion for a new trial or in arrest of judgment, nor did any other attorney do so, respondent says that this is not an error at all since it is apparent on the face of the record; that it is very strange and would make any one inquisitive why, if the defendant did employ counsel, he did not have him file a motion for a new trial or in arrest of judgment. The defendant was found guilty by a jury and sentenced by the court in the regular way;

"As to defendant's allegation that the defendant protected his own court that he did not receive a fair trial in that he was denied the right of counsel to cross-examine the state witnesses and protect his defense, respondent says that this would not be an error of fact of which the court did not know, since the defendant with a little reflection must be protected in open court, so that it is not true that the court was negligent of all the facts;

[illegible]

7. In answer to the question of having a position, respondent says that he is a construction worker and that the Government is not interested in him and that he is not interested in the Government. He says that he is not interested in the Government and that he is not interested in the Government.

"8. In answer to paragraph 7 of defendant's motion, it is noted that defendant filed a motion to set aside his conviction on the ground that he was insane at the time he committed the crime. This motion was denied by the Honorable Judge of the Court, Judge of Cook County, on the 1st day of October, 1931.

days to prepare and file a bill of exceptions; that the defendant at that time had competent attorneys in the persons of Jay J. McCarthy and Eugene McCaffrey; that no further action was taken in this matter, and, since this was a final and appealable order and the time for a bill of exceptions has expired, the defendant is entirely out of court;

"9. Respondent further says that whether Mr. Herzog, who filed his appearance in the above entitled cause, whether he withdrew his appearance or not would be immaterial, since he refused and neglected to act for the defendant, Patrick P. Dwyer, and the Court appointed a competent attorney in the person of Mr. Barbour to defend him in open court;

"10. In answer to defendant's allegation in paragraph 11, that he was under duress at the time of the rendition of the judgment, respondent denies that allegation and calls attention to the defendant's own words in paragraph 4, that the defendant in open court protested to the Court and was at liberty to tell the Court anything he wished to say; that he was not under duress at that time, and, if he was, he had ample time within the five year period in which to bring a writ of error coram nobis to call that fact to the attention of the Court, and the fact that he filed a motion to correct and amend the record on January 16, 1931, would show that he was not under duress at that time and he could have filed his petition in the nature of a writ of error coram nobis at the same time;

"11. Respondent further says that the allegations in the petition do not make out a prima facie case and are more or less conclusions of the pleader, and do not come within the rule governing petitions in the nature of a writ of error coram nobis; that the facts alleged in said petition were known to the Court and the defendant has slept on his rights; and that, since the Supreme Court affirmed his conviction, and since the defendant's motion to correct and amend the record and vacate the judgment was denied in open court, the facts alleged are insufficient to give the Court jurisdiction in the above entitled cause;"

After several continuances the court proceeded to a hearing of Dwyer's petition, and in addition to Dwyer, who testified as a witness in his own behalf, the defendant also produced James J. Barbour, who had been appointed as counsel for Dwyer in the trial which resulted in his conviction and sentence to the state penitentiary, and Theodore Levin, who was at the time an assistant state's attorney, assigned to the court room of Judge Gemmill and who prosecuted the case against Dwyer on April 14, 1926. Defendant also introduced in evidence several pages of an instrument purporting to be the common law record in indictment No. 39065, upon which the trial and conviction of Dwyer was predicated, showing the proceedings had before Judge Gemmill upon trial of the cause, as well as evidence showing the written appearance of one Herzog as attorney for

defendant. After the hearing of the evidence adduced in support of the petition and the argument of counsel, the court sustained the petition and ordered that Dwyer's sentence be vacated and set aside and that indictment No. 39065, entitled People v. Dwyer, be redocketed and set for trial on April 22, 1938. Thereafter the People were allowed time within which to present a correct and certified record of the proceedings and for the filing of notice of appeal, and in October, 1938, motion for leave to appeal was here allowed.

It is conceded, of course, that Dwyer's conviction was affirmed by the Supreme court in 1927, but it is argued that the Supreme court on writ of error reviews the common law record attested by the clerk of the trial court and the bill of exceptions attested by the trial judge, and considers only matters appearing on the face of the record; that the affirmance of a judgment of conviction by the Supreme court is res adjudicata as to every question raised, but that it in no wise affects matters and things not appearing of record and which could not be presumed to the Supreme court on writ of error; and that since the matters and things complained of by Dwyer do not appear on the face of the record and could not have been presented to the Supreme court on a writ of error, defendant is entitled to avail himself of the only remedy he had, namely, the filing of a petition for a writ of error coram nobis under section 72 of the Practice act (Illinois Revised Stats. 1937, chap. 110, par. 196). The writ of error was sued out a little less than a year after defendant was convicted, and it is fair to assume that the matters of which he now complains were all well known to him at the time he was sentenced and before he sued out the writ of error. If he had communicated this information to counsel, they could have petitioned the criminal court to set aside the judgment, and failing in that behalf, they could have raised all of the questions urged in his petition on writ of error to the Supreme court and there secured an adjudication of all his

defendant. After the hearing of the evidence adduced in support of the petition and the argument of counsel, the court sustained the petition and ordered that Baker's sentence be vacated and set aside and that inasmuch as No. 32068, entitled *Baker v. New York*, be reclassified and set for trial on April 23, 1937. Thereafter the record was allowed time within which to present a correct and certified copy of the proceedings and for the filing of notice of appeal, and in October, 1937, motion for leave to appeal was granted.

It is conceded, of course, that Baker's conviction was affirmed by the Supreme Court in 1937, but it is argued that the Supreme Court on writ of error review the common law record stated by the clerk of the trial court and the bill of exceptions attached by the record, and considers only matters appearing on the face of the record; that the affirmance of a judgment of conviction by the Supreme Court is not subject to every question raised, but that it is in no wise affected by matters and things not appearing on the face of the record and that matters not presented to the Supreme Court on writ of error and that since the matters and things complained of by Baker do not appear on the face of the record and could not have been presented to the Supreme Court on a writ of error, defendant is entitled to avail himself of the only remedy he has, namely, the filing of a petition for a writ of error *coram nobis* under section 75 of the Practice Act (Illinois Revised Statute, 1937, chap. 110, par. 196). The writ of error was issued out a little less than a year after defendant was convicted, and it is fair to assume that the matters of which he now complains were all well known to him at the time he was sentenced and before he sued out the writ of error. If he had communicated this information to counsel, they could have petitioned the original court to set aside the judgment, and failing in that behalf, they could have raised all of the questions urged in his petition on writ of error to the Supreme Court and there received an affirmation of all his

rights. Under the rule in this state, when a judgment is affirmed by the Supreme court, all questions raised by the assignment of error, and all questions that might have been so raised, are to be regarded as finally adjudicated against appellant or plaintiff in error, and the judgment must be regarded as free from all error. (People v. Superior Court, 234 Ill. 186.)

Defendant's counsel argue, however, that section 72 of the Practice act takes the place of the common law writ of error coram nobis, and is designed and intended to cure errors of fact not appearing on the face of the record, and that for this reason the affirmance by the Supreme court would not prevent defendant from getting relief under the coram nobis proceeding. The fallacy of this argument is lodged in the fact that the various matters of which defendant complains were all known to the court when sentence and judgments were entered, and presumably this knowledge did not affect the court's decision. One of the cases cited by defendant, Jacobson v. Ashkinaze, 337 Ill. 141, holds that in proceedings instituted under section 72 of the Practice act, the matters of fact must be those not appearing of record, which, if known at the time judgment was rendered, would have prevented its rendition, and that rule has been consistently followed in this state. All of the matters contained in the petition were known to the court when judgment was rendered, and since the court entered judgment notwithstanding its full knowledge of the circumstances, it cannot fairly be contended that the allegations of the petition were matters of fact not appearing of record which, if known to the court at the time judgment was rendered, would have prevented its rendition.

Under chapter 110, section 72, Illinois Revised Statutes 1937, the limitation on a writ of error coram nobis is fixed at five years, and we see no reason why this statutory enactment should not be binding on Dwyer, who has allowed some twelve years

rights. Under the rule in this state, when a judgment is affirmed by the supreme court, all questions raised by the judgment of error, and all questions that might have been raised, are to be regarded as finally adjudicated and no longer open for discussion in error, and the judgment must be regarded as final from all error.

(People v. Hooper, 224 Ill. 186.)

Defendant's counsel argues, however, that section 72 of the Practice Act takes the place of the common law rule of error coram nobis, and is designed and intended to cure errors of fact not appearing on the face of the record, and that for this reason the affirmance by the supreme court would not prevent defendant from getting relief under the coram nobis proceeding. The fallacy of this argument is found in the fact that the various matters of which defendant complains were all known to the court when judgment and judgments were entered, and presumably this knowledge did not affect the court's decision. One of the cases cited by defendant, Leopold v. Lehigh, 357 Ill. 141, holds that in proceedings instituted under section 72 of the Practice Act, the matters of fact must be those not appearing of record, which is known at the time judgment was rendered, would have prevented its rendition, and that rule has been consistently followed in this state. If of the matters contained in the petition were known to the court when judgment was rendered, and since the court entered judgment accordingly, and in its full knowledge of the circumstances, it cannot fairly be contended that the allegations of the petition were matters of fact not appearing of record which, if known to the court at the time judgment was rendered, would have prevented its rendition.

Under chapter 110, section 72, Illinois Revised Statutes

1937, the limitation on a writ of error coram nobis is fixed at

five years, and we see no reason why this should be extended

should not be binding on every case, and if it were some other years

to elapse since the rendition of the judgment. The judge who presided at his trial has long since died, and undoubtedly many of the witnesses for the prosecution are no longer available. Defendant's counsel seek to avoid the binding effect of this statute by arguing that defendant was under duress at the time judgment was entered and therefore the limitation contained in section 72 of the **Practice** act becomes inoperative. We do not think that the doctrine of duress can be applied to Dwyer's circumstances. After his trial he sought to set aside an order showing the appointment of counsel and claimed that he was not represented on trial. After his conviction he sued out a writ of error, thus showing that he was at liberty to litigate the various matters of which he felt aggrieved, without any restraint, and the mere fact that he has been confined in the penitentiary does not mean that any physical or mental compulsion, which he could not overcome, was exercised against him. (Van Alstine v. McAldon, 141 Ill. App. 27.)

Since the facts upon which defendant seeks relief under section 72 of the Practice act were well known to the court, and the case having been taken to the Supreme court, where it was affirmed, we are impelled to hold that the petition in the nature of a writ of error coram nobis should not have been allowed, and therefore the order of the criminal court, setting aside the judgment and sentence entered in 1926 by Judge Gommill, is reversed and the cause is remanded with directions that Patrick P. Dwyer be remanded to the custody of the warden of the Illinois penitentiary.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Burke, P. J., and Sullivan, J., concur.

to elapse since the rendition of the judgment. The judge who presided at his trial has long since died, and undoubtedly many of the witnesses for the prosecution are no longer available. Defendant's counsel ask to avoid the binding effect of this statute by arguing that defendant was under duress at the time judgment was entered and therefore the limitation contained in section 72 of the Criminal Code does not become inoperative. We do not think that the testimony of duress can be applied to a party's circumstances. After his trial he sought to set aside an order showing the appointment of a counsel and claimed that he was not represented on trial. After his conviction he sued out a writ of error, then showing that he was at liberty to litigate the various matters of which he felt aggrieved, without any restraint, and the mere fact that he has been confined in the penitentiary does not mean that any physical or mental compulsion, which he could not overcome, was exercised against him. (Van Lefevre v. McAlibon, 141 Ill. App. 37.)

Since the facts upon which defendant seeks relief under section 72 of the Criminal Code are well known to the court, and the same having been taken to the Supreme Court, where it was affirmed, we are impelled to hold that the petition in the nature of a writ of error coram nobis should not have been allowed, and therefore the order of the criminal court, setting aside the judgment and sentence entered in 1926 by Judge Gemmill, is reversed and the cause is remanded with directions that Patrick P. Dwyer be remanded to the custody of the warden of the Illinois Penitentiary.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

BURKE, J., and WILLIAMS, J., concur.

40180

JUNE HEWITT, Administrator of the
Estate of ARTHUR J. HEWITT,
Deceased,

(Plaintiff) Appellee,

v.

LEO MICHUDA and LEO MICHUDA, JR.,
Co-Partners doing business under
the name and style of LEO MICHUDA
AND SON,

(Defendants) Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

298 I.A. 622¹

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment for the sum of \$6,000.00 entered against them on the verdict of a jury in favor of plaintiff, June Hewitt, as administratrix of the estate of Arthur J. Hewitt, deceased. The amount sued for is \$11,034.56. The claim is based upon an alleged agreement by the defendants to pay Arthur J. Hewitt a commission, based on certain monthly payments received by defendants from the Sanitary District of Chicago for work done by them in the building of a tunnel for the District. Hewitt was killed in April, 1936,

It is the claim of plaintiff that in the early part of the year 1935 the Sanitary District of Chicago was about to engage in the building of certain tunnels and sewers; that although defendants had been, in what is termed, the general contracting business, they were without experience in the building of tunnels and sewers, and that in view of the fact that Arthur J. Hewitt had had a large experience in this sort of work, Hewitt was employed by defendants to assist in preparing bids for submission to the Sanitary District of Chicago for the doing of the work referred to, and to qualify them to enter into a contract should they be low bidders for any of the work and be awarded any such contract; that in addition to the services above mentioned, Hewitt was also to

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THE COURT, in its decision, has found that the defendant is not entitled to a judgment for the sum of \$10,000.

(The Court's decision is based on the facts of the case.)

v.

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(The Court's decision is based on the facts of the case.)

act as a consultant in the construction of any work provided for by any such contract. It is further charged that for such services Hewitt was to be paid one per cent of the bid price under any contract which defendants might so obtain; that on August 8, 1935, defendants submitted a bid for the sum of \$1,103,456.00 for the building of a sewer, which is referred to in the record as sewer No. 4, that they were the lowest bidders on the work, that thereafter they entered into a contract with the Sanitary District of Chicago for the doing of such work for the price mentioned, that although plaintiff's intestate in his lifetime performed all the services agreed to be performed, and that plaintiff has demanded of defendants payment of the amount alleged to be due, he only received from them the sum of \$419.82, and that although demand was made, defendants refused to make further payments. Defendants' theory is that there was no agreement between defendants and deceased for his employment as claimed on the job in question; that there was no agreement to pay him one percent or any other sum, that deceased did not perform any services for defendants except some minor clerical services in connection with the purchase of equipment, and that he was paid in full for such services.

On the trial, a surety bond broker testified, in substance, that he had known the Michudas prior to 1935, when the manager of an insurance company named Wallace stated that the Michudas were to bid on some tunnel work; that the witness checked up on the Michudas as to their experience in engineering and in doing work of the character suggested; that the Michudas were unfamiliar with tunnel work, and that the witness suggested the name of Arthur J. Hewitt as a person who could assist them in meeting the requirements of any insurance company which might furnish a bond to the Michudas in case they were awarded any such contract, and that he brought

not as a consultant in the investigation of any case brought for
by any such contract. It is further charged that the same witness
Harris was on the payroll and part of the time of the witness
contracted with defendant with to obtain; that on August 1, 1935,
defendant submitted a bill for the sum of \$1,175.00 for the fee
of a lawyer, which is referred to in the record as being
Mr. A. that they were the largest bill of the case, that after
after they entered into a contract with the defendant, Harris
Chicago for the delay of work with for the time mentioned, that
although defendant's interests in his litigation were not all the
services were to be performed, and that in fact, the defendant
of defendant's payment of the amount alleged to be due, in 1935,
received from them the sum of \$1,175.00, and that although Harris
and one, defendant refused to make further payments. Defendant,
theory is that there was no agreement between defendant and
defendant for his employment as claimed in the bill in question; that
there was no agreement to pay him any amount for any other work,
that defendant did not receive any services for defendant's account
some other alleged services in connection with the expenses of
defendant, and that he was paid in full for such services.
On the trial, a jury heard evidence testified, in substance,
that he had known the witness since 1920, when the witness was an
insurance company agent, and that the witness was an old
on some tunnel work; that one witness appeared on the stand
as to their testimony in connection with in doing work of the
operator suggested; that the findings were favorable to the
jury, and that the witness suggested the name of Harvey A. Harris
as a person who could assist them in making the improvements at
any business company which might furnish a bond to the witness
in case they were needed any more contract, and that he stopped

Hewitt and the Michudas together. The witness, at this point, identified the signature of the Michudas to the following document which was introduced and received in evidence:

"LEO MICHUDA & SON
Contractors & Builders
Chicago

514 East 95th Street

Phone Commodore 3332
June 6th, 1935.

Mr. A. J. Hewitt,
Wheaton, Illinois

Dear Sir:

We understand the Sanitary District of Chicago are going to advertise a tunnel job on the 7th of this month. As per our agreement, we will expect you to join us on this on the same basis as the first, namely 1% of the contract price, and we rely on your word that you will not join any other contracting firm.

Very truly yours,
LEO MICHUDA & SON
By Leo Michuda"

The underwriter of surety bonds, representing the company which subsequently became surety for the Michudas after they had been awarded a contract by the Sanitary District of Chicago and about which this controversy came into being, testified to the effect that he discussed the Michudas, their engineering experience and their ability to carry out contracts, with the first mentioned witness before advising the giving of the surety bonds by his company. He testified to the further effect that when the proposition for furnishing bond for the Michudas was first broached to him, he hesitated about furnishing a bond because of their inexperience, but that when he was informed that the Michudas had employed Hewitt, a man of experience in tunnel work and similar activities, he finally approved the bond.

A structural engineer who was employed to do engineering work on the sewer contract which was awarded to the Michudas and which is the basis of this litigation, testified to the effect that from September 5, 1935, to February 20, 1936, he worked at the

Jewett and the witness together. The witness, at this point, insisted the signature of the witness to the following contract which was introduced and received in evidence:

WITNESSES:
Contractors & Builders
Chicago

JOHN BOWMAN JR.
James Cox, Jr.

His best man

Mr. A. J. Jewett,
Chicago, Illinois

Dear Sir:

We understand the January list of names and going to advertise a house for the sale of the same. As per our agreement, we will advise you to take up on this on the same basis as the first, namely, it is not contract time, and we rely on your word that you will not join any other contracting firm.

Very truly yours,
John Bowman Jr.
James Cox, Jr.

The undersigned at twenty bonds, representing the company which was originally made solely for the purpose of the sale of the same, and a contract by the January list of names and about which this company was made, testified to the effect that he discussed the situation, their intention, and their ability to carry out contracts, with the first witness, and before advising the list of the twenty bonds to the company. He testified to the fact that when the company was formed for the purpose of the sale of the same, he was present and that he was present about the formation of the company, but that when he was informed that the witness had employed Jewett, a man of experience in general work and building, he finally severed the bond.

A structural engineer who was employed as an engineering work on the same contract which was made to the witness and which is the basis of this litigation, testified to the effect that from September 1, 1915, to February 10, 1916, he worked at the

office of Michuda & Son, the defendants, and that Hewitt, during this period, was at the site of the job, and that he, Hewitt, furnished information frequently; that for a period Hewitt was there every day and that he had a desk in the offices of the Michudas; that one of the main things he did was to qualify the bidder for the job. He testified that Hewitt advised the Michudas as to the sort of equipment they should use and who they should purchase such equipment from; that Michuda had never done any work of this character prior to this particular job; that the witness had a conversation with Michuda, Sr., with regard to the compensation which Hewitt was to receive, and that Michuda then told the witness that Hewitt was to receive 1% of the contract price. Michuda further stated that in view of the fact that Hewitt was taking many risks, and that if anything happened to Hewitt, that he, Michuda, would see to it that Hewitt's widow would receive whatever was coming to him. This witness was asked what he considered fair and reasonable for the services which he testified he had seen Hewitt perform, to which he gave the following answer: "This particular case in view of the circumstances and nature of which I think the Court should be very lenient in admitting all facts and circumstances possible so that the jury may have all the facts that can possibly be presented." The following questions and answers were given: "Question: Is that because Hewitt is dead?" "Answer: (The Court) Well, partly that and partly because of the uncertainties in this case. I would say from my experience anywhere from one thousand to fifteen thousand dollars." "Answer: (The Witness) I would consider the one per cent of the contract price in this case reasonable."

The construction engineer who had charge of the work in question for the defendants, testified to the effect that Hewitt was introduced to the witness by one of the Michudas, and that he worked

office of the... this period... furnished information... there every day... Nicholas; that one of the... bidder for the job. He testified... as to the fact of... purchase... this character... a conversation with... which letter was to receive... that letter was to receive... stated that in view of the fact that... and that if anything... see to it that... him. This witness... for the purpose... which he gave the following... of the circumstances... very faint... that the jury... The following... that because... say from my experience... dollars." (The witness)... of the contract...

The... question... information...

for the defendants on the contract referred to as No. 4 during the months of August, September and October, 1935; that during this time Hewitt was acting in an advisory capacity to the Michudas, that Hewitt frequently consulted the witness about the work being done and that he, the witness, supervised all of the work.

An attorney-at-law who had been employed by Hewitt, testified that on December 27, 1935, the witness typed, Hewitt signed and the witness mailed the following letter which had reference to the payment of a claim against Hewitt by the Michudas:

"Dawes Avenue
Wheaton, Illinois
December 27, 1935

Leo Michuda & Son,
514 East 95th Street,
Chicago, Illinois

Gentlemen:

This is to authorize you to pay to the General Electric Contracts Corporation, the sum of \$135.26 due them on electric refrigerator account. You will kindly charge same against my account covering one per cent fee in connection with your contract with the Sanitary District of Chicago.

Yours very truly,
A. J. Hewitt"

The record indicates that the Michudas claim they did not receive this letter.

William A. Hewitt, a son of the decedent, testified that about August, 1935, Michuda, Sr., stated to the witness that the Michudas' agreement with the decedent was that decedent was to receive as his compensation for services rendered to the Michudas, one per cent "of the amount of the contract."

On behalf of the defendants, the assistant superintendent of the work in question, testified to the effect that he had charge of the work in question, and that "the government" required that in keeping the payrolls, every man employed should be shown on such payroll, and that Hewitt's name did not appear thereon.

for the defendant on the grounds that he was not a partner in the business of defendant, and that the business of defendant was not a partnership. The court held that the defendant was not a partner in the business of defendant, and that the business of defendant was not a partnership. The court held that the defendant was not a partner in the business of defendant, and that the business of defendant was not a partnership.

A copy of the report of the committee on the defendant's conduct was filed in the court on December 17, 1915, and the defendant was notified of the same. The defendant was notified of the same on December 17, 1915, and the defendant was notified of the same on December 17, 1915.

"The defendant was notified of the same on December 17, 1915, and the defendant was notified of the same on December 17, 1915."

100 North 4th Street,
Chicago, Illinois

Gentlemen:
This is to authorize you to pay to the order of the defendant the sum of \$100.00 on account of the defendant's account. You will kindly advise the defendant of the same. Very truly yours,
J. J. [Signature]

The report of the committee on the defendant's conduct was filed in the court on December 17, 1915, and the defendant was notified of the same. This letter.

Will be filed in the court on December 17, 1915, and the defendant was notified of the same. The defendant was notified of the same on December 17, 1915, and the defendant was notified of the same on December 17, 1915.

On behalf of the defendant, the committee on the defendant's conduct was filed in the court on December 17, 1915, and the defendant was notified of the same. The defendant was notified of the same on December 17, 1915, and the defendant was notified of the same on December 17, 1915.

As already stated, defendants insist that there was no such contract as claimed by plaintiff and that there is nothing in the evidence upon which to predicate the amount of the verdict. However, after reviewing the entire record, we reach the conclusion that the verdict is not contrary to the manifest weight of the evidence, and for that reason, we feel that we are not justified in reversing the verdict and judgment.

The judgment of the Circuit Court of Cook County is, therefore, affirmed.

JUDGMENT AFFIRMED.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

the witness of fact, defendant insists that there was no
such contract as claimed by plaintiff and that there is no evidence in
the evidence upon which to predicate the amount of the verdict.
However, after reviewing the entire record, we believe the conclusion
that the verdict is not contrary to the weight of the
evidence, and that there is no such error as to be considered
in reversing the verdict and judgment.
The judgment of the District Court is hereby affirmed.
Affirmed, with costs.

Wm. H. Smith, Jr.,

Attorney for Plaintiff, et al.

39848

JOHN GREENE, a minor, by JOSEPH GREENE,
his father and next friend,

(Plaintiff) Appellee,

v.

FRENZEL BROTHERS COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

298 I.A. 622²

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered for \$10,000 upon the verdict of the jury. This action for damages was instituted by the plaintiff, John Greene, a minor, by Joseph Greene, his father and next friend, to recover for personal injuries sustained by the minor. The accident in which the plaintiff was injured occurred on September 19, 1935 on George Street between Fairfield Avenue and Washtenaw Street in the City of Chicago, when the rear wheel of a trailer attached to an automobile truck driven by the servant of the defendant ran over the back of the heel of the plaintiff. In this appeal no question is raised in the briefs filed regarding the pleadings. The question is largely one of fact together with the instruction complained of that was given for the plaintiff on the question of recovery of damages. The cause was tried before the court and a jury and, as we have indicated, the jury found the defendant guilty and assessed plaintiff's damages at \$10,000.

The street upon which the accident happened is known as George Street, in Chicago. It is about 25 feet wide, paved with asphalt and runs in an east and west direction. Between five and six o'clock on the afternoon of September 19, 1935, several boys, including the plaintiff, were playing baseball on that pavement between Fairfield and Washtenaw avenues. The boys in the neighborhood of this location on George Street had been playing baseball on this pavement all summer, the home plate being about two yards from the

north curb or at the position shown by an ink cross mark on defendant's Exhibit No. 1. The first base was on the parkway or prairie north of the north curb; second base between the north curb and a sewer plate cover in the street, and third base was on the south side of the pavement.

The defendant urges that the court erred in receiving the verdict and entering judgment as being against the manifest weight of the evidence.

The plaintiff produced six witnesses, and the testimony of each witness indicates the following:

1. That the driver of the truck failed to blow a horn;
2. That the defendant was driving the truck and trailer in a zigzag manner west on George Street;
3. That there was within a few feet from the north curb of George Street at the time and place of the accident a hole in the pavement about three feet square and from 4 to 7 inches deep, filled with water.

The plaintiff at the time of the injury was 11 years and 5 months of age, and he was a normal boy of average intelligence and schooling and was in grade 5-Bina Chicago elementary school.

It appears from the evidence that George Street is not a heavily traveled thoroughfare, and that the block where the accident occurred was the scene of frequent baseball games, participated in by men and boys of various ages in the neighborhood.

The testimony of the plaintiff as suggested by counsel for the plaintiff is that just prior to the accident the baseball game had been going on for an hour. The plaintiff was at bat facing west. Daryl Oryn, eight years old, was pitching. Paul Hoffman, ten years old, was on first base. Richard Glowienke, ten years old, was on third base. Howard Sounhein, fifteen years old, was the catcher for both sides. While the children were in the positions described, their game was interrupted by the passage of a west bound

North side of the highway about 100 feet from the corner of
 defendant's lot No. 1. The lot was then in the hands of
 parties parties of the North side; second road between the North side
 and a street right corner in the street, and third road on the
 North side of the highway.

The defendant was then the party who was in possession
 the verdict and entering judgment as being against the plaintiff
 right of the witness.

The plaintiff produced the following:

1. That the driver of the truck failed to stop;
2. That the defendant was driving the truck and failed to
 a right corner with an empty street;
3. That there was within a few feet from the North side of
 North street at the time and place of the accident
 hole in the pavement about three feet square and from
 4 to 7 inches deep, filled with water.

The plaintiff at the time of the injury was 11 years old
 2 months of age, and he was a normal boy of average intelligence
 and schooling and was in good health at the time of the injury.
 It appears from the evidence that the injury was not a
 heavily treated fracture, and that the bones were not broken
 occurred was the nature of treatment received, and that in
 by him and boys of various ages in the neighborhood.

The testimony of the plaintiff is supported by evidence
 for the plaintiff is that just prior to the accident the plaintiff
 was had been going on for an hour. The plaintiff was at that time
 was. Mary Ann, about three old, was sitting. The plaintiff
 ten years old, was at that time. The plaintiff, the plaintiff
 was on the road. Howard Johnson, fifteen years old, was the
 corner for some time. With the plaintiff was in the plaintiff
 defendant, could have been interrupted by the presence of a third person

Ford. Upon hearing the horn of the Ford, the boys all stood clear of the street. The plaintiff moved to the north and took a position on the pavement about a foot from the north curb. When he was at bat he was facing west and after moving over to the curb for the Ford, he continued to face west. Daryl Oryn, the pitcher, moved over to the north curb, west of the plaintiff. After the Ford passed, the plaintiff stood in the same position facing west, holding the bat and waiting to resume play when Daryl returned to the pitcher's box. The plaintiff testified: "I was watching the pitcher and I wasn't going to get back in the batting box until he got back in the pitching box." The defendant's vehicle, consisting of a truck drawing a platform trailer and attended by a driver and "trailer man", came west down the street just after the Ford had passed the boys. The plaintiff further testified that he remained in the position previously described, heard no horn or warning of any kind, did not know there was a truck on the street, and then felt an awful pain in his foot and fainted. The next thing he remembered was being in the Alexian Brothers Hospital. The other boys and one girl present describe the plaintiff as being in the same position, just prior to being struck by the right wheel of the trailer. They also testified that there was no horn or other signal from the truck; that there was a man on the running board, the "trailer man", who was talking to the driver and who carried no warning flag.

There is also evidence introduced by the plaintiff that the truck and trailer swerved when passing the plaintiff; that there was a hole or water leak in the pavement, several feet east of the home plate. Employees of the City of Chicago testified from the records that a complaint of a leak in the water main of George Street, 100 feet from Washtenaw at the alley was made on August 22, 1935, about one month before the accident; that an investigation was made

ford, upon meeting the boat of the boat, the boys all agreed that
of the boat. The boatman went to the boat and found a boatman
on the ground about a foot from the boat. When he was at
the boat he was looking west and after looking over to the boat for the
boat, he returned to the boat. When he was at the boat, he was
over to the boat, and of the boat. When he was at the boat, he was
passed, the boatman stood in the boat looking at the boat.
holding the boat and looking to the boat. When he was at the boat, he was
the boatman's boat. The boatman's boat: "I was looking at the
boat and I wasn't going to the boat in the boat. The boatman
not back in the boat. The boatman's boat, something
of a boat. The boatman's boat is the boat. The boatman's boat
"traveller man", once more with the boat. When he was at the boat, he was
passed the boat. The boatman's boat: "I was looking at the boat.
in the boat. The boatman's boat, when he was at the boat, he was
any kind, the boatman's boat. The boatman's boat, when he was at the boat, he was
an early boat in the boat. The boatman's boat, when he was at the boat, he was
was going to the boat. The boatman's boat, when he was at the boat, he was
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100 feet from the boat. The boatman's boat, when he was at the boat, he was
about was about the boat. The boatman's boat, when he was at the boat, he was

on August 26, 1935, and a leak through the asphalt was found; that repairs on the main were made on October 2, 1935, and the street repaired on December 15, 1936. In passing the plaintiff the right rear wheel of the trailer struck his left heel and crushed it against the pavement, tearing off his left shoe.

This evidence is disputed by evidence offered by the defendant in which it appears that the truck and trailer were being driven west on George Street about 7 or 8 feet from the north curb. The truck was about 7 feet wide; the trailer about 9 feet wide, and in addition to the driver there was a man on the running board who had a red flag in his hand. The truck sounded its horn when 100 feet away from the children and they scattered. There were no holes in the street. The truck did not swerve, but passed the boys when the right rear wheels of the trailer were about 7 feet from the north curb. As they passed the plaintiff, the boy with the bat, they saw him about a foot or two from the curb, - "right along side of the curb" with his back to the truck. The "trailer man" looked back as the truck passed the plaintiff. "The biggest part of the equipment had gotten by the boy, and all but the hind wheels of the trailer. The boy was alongside the curbing. That is how I saw him as the truck and trailer drove down the street. * * * I did not see any of them move back into the street as the truck was passing. * * * They were standing out of the way at the time we were passing, near the right hand or north curb. * * * The truck was about 7 feet from the north curb and about the same from the south curb." Neither of the men on the truck knew that an accident had happened until after the truck had been put in the garage, some time later.

The plaintiff has called our attention to the evidence as quoted from the testimony of the several witnesses and the questions and answers put to and answered by several of the witnesses who

testified, and from all we can gather there was a disputed question of fact, which was for the jury.

As we have stated, the facts were controverted and it was for the jury to pass upon the questions submitted by the court as directed by the instructions given at the time of the trial.

Our attention has been called to a case which we think is pertinent entitled Gavin v. Keter, 278 Ill. App. 308. This court said:

"A trial court has more latitude than this court in passing upon the verdict of a jury. The allowance or refusal of a new trial on the weight of the evidence is peculiarly within the discretion of the trial court and he is warranted in granting a new trial if a plaintiff has failed to sustain his claim by a preponderance of the evidence. In passing upon the question as to whether or not the trial court in such case was justified in granting a new trial, we must bear in mind that there are many things which a trial judge observes on a trial that do not appear from the printed record, - the appearance of a witness, his or her manner of testifying, and other circumstances that greatly aid the trial court in determining the credibility of a witness and the weight, if any, that should be attached to his or her testimony."

As we have indicated, the questions which are submitted by the defendant are that the verdict of the jury is against the manifest weight of the evidence, and that the plaintiff was guilty of contributory negligence. In examining the evidence as it appears in the record we are unable to reach the conclusion that the plaintiff was guilty of such contributory negligence as would justify this court in reversing the verdict. This was a question for the jury, and they are required to take into consideration the evidence as it appears before them, the testimony of the plaintiff and the other witnesses, and determine from that evidence whether the plaintiff was in the exercise of that degree of care and caution for his own safety as the law requires of a boy of his age, understanding, intelligence and experience, and whether from the evidence appearing in the record there was failure to give warning of the approach of the truck to the plaintiff by sounding a horn,

is pertinent entitled Wain v. Wain, 70 Ill. 2d 501. This
 Our attention has been called to a case which is cited
 directed by the instructions given at the time of the trial.
 for the jury to learn from the evidence presented by the State
 as we have stated, the State was concerned and it is
 of fact, this was for the jury.

[illegible][illegible]

or there was inattentiveness of defendant's two servants - especially on the part of the "trailer man" who was present on the running board of the truck, allegedly equipped with a red flag, whose duty it was to warn pedestrians and vehicles of the dangerous equipment attached to the truck, and in driving the vehicle so close to children known to be present in the street as to endanger them, were questions to be considered by the jury, together with all the facts and circumstances, in reaching the conclusion that the plaintiff was in the exercise of that degree of care and caution required by the rule of law for one of his age, intelligence, capacity, and experience, and it was for the jury to determine from all the facts as to whether the defendant was guilty of negligence.

The court's attention is called by the defendant to the amount of the judgment, and it is suggested that this amount is not justified by the evidence in the record. The defendant also contends that the giving of an instruction for the plaintiff upon the question of damages may have led the jury to speculate upon the damages that the plaintiff may have sustained. The instruction that is questioned is in these words:

"If you find the issues for the plaintiff, you will be required to determine the amount of his damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances as proved by the preponderance of the evidence before them, the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the preponderance of evidence to have resulted from the occurrence in question; his pain and suffering, if any, and loss of health, resulting from such physical injuries, if any, so far as the same are shown by the preponderance of evidence to have resulted from the occurrence in question; his pain and suffering, if any, and loss of health resulting from such physical injuries, if any, and such future suffering and physical impairment and loss of health, if any, as the jury may believe from the preponderance of the evidence before them in this case he has sustained or will sustain by reason of such injuries, so far as the same are shown by the preponderance of the evidence in this case to have resulted from the occurrence in question; and also such sums as you may believe from the evidence, if any, the plaintiff will lose in earnings after he becomes twenty-one (21)

years of age, if any; all moneys necessarily expended or which he has become liable for on account of all reasonable medical and surgical bills incurred, if any, while being treated for such injuries, if any, and reasonably designed to cure same; and you may find for him such a sum as in the judgment of the jury under the preponderance of the evidence and instructions of the court in this case will be a fair and just compensation for the injuries and damages he has sustained or will sustain, if any, as a proximate result of the occurrence in question, so far as such damages and injuries, if any, are alleged and proved by a preponderance of the evidence in this case."

The defendant in criticizing this instruction concedes that under certain proof and circumstances a minor may recover for any loss of the earnings of his labor after he shall arrive at the age of twenty-one years, and it is also the law that any earnings which a minor person may have until he becomes twenty-one years of age belong to his parents except and unless the minor becomes emancipated. We quite agree with counsel's statement that a minor may recover for any loss of the earnings of his labor after he shall arrive at the age of 21 years, but as to whether the parents may recover the earnings of a minor person until he becomes 21 years of age, is not the question in this case, for the parent, Joseph Greene, who is the father, and who appeared in this action as next of kin, is not seeking to recover whatever loss, if any, he may have sustained. The facts upon which the jury are called upon to pass are, that this lad suffered a permanent injury to his foot, and that he has a marked dropping of the left foot and external rotation. He walks with his foot turned outward with a distinct limp as there is a shortening of the left foot and ankle, the bones having been partially removed. Whenever he walks his foot appears too straight as he has no mobility and there is destruction of the joint itself. There is evidence that the condition is permanent and will remain throughout his life. As to the seriousness of his injury, he was in the hospital for more than 13 months after the accident. At the hospital he spent nine months in bed, three months in a wheel chair and a month on crutches, and he used crutches for a month

after leaving the hospital, and was advised by the physician to wear a special shoe. So, when we examine the record there is evidence which would tend to show that this condition brought about by the accident to this minor was a serious one, and the evidence sustains the theory that the injury is permanent.

A like instruction was given to the jury by the court in the case of Wolozek v. Public Service Co., 342 Ill. 482. In examining this opinion the argument of the defendant in the case before us is similar to that raised in the Supreme Court as to the giving of an instruction of the kind we have before us, and the court in replying to the suggestion made, said, "that there is no evidence on which loss of earnings after twenty-one years of age could be based". The court further stated: "While the record did not, and clearly could not show what this boy would earn after he became twenty-one years of age, it does show with equal clearness a loss of his arm, which is a permanent injury, and it is evident that his earning power will at that time be materially reduced. Having this suggestion in mind, we are of the opinion that the condition of the minor is such that the injury is permanent, and, in a measure, will interfere with his earning power, as he will be a cripple. We believe that in following the instruction similar to the one given in the case just cited and approved by the Supreme Court there was no error in allowing the jury to consider the instruction in arriving at the verdict for damages, and we do not believe that the jury was influenced so far as the amount allowed is concerned, when we further consider the expenses that were necessarily incurred after the injury. We find there is evidence that the bill of Dr. Greene, who was the attending physician, was \$1500; that the bill of Alexian Brothers Hospital was \$110.25, and that of St. Elizabeth's Hospital was \$1418.20, making a total of \$3,028.45.

This is the amount that is actually due for services rendered by the doctor and the hospitals in looking after the welfare of this minor. When we consider all the facts in this case, and that the condition of the minor is such that he is permanently disabled, we are of the opinion that the verdict is not excessive.

There is one further question which we wish to pass upon, and that is as to whether the court erred in permitting and allowing the plaintiff's x-ray films to be introduced in evidence. In qualifying the x-ray films for the purpose of rendering them competent to be considered by the jury, it appears from the suggestion of the plaintiff that Dr. Greene, the attending physician testified to the separate taking of each picture, giving the date on which it was taken, and said they were taken under his supervision and direction; that he had had experience in taking and interpreting x-ray films. The films were taken in St. Elizabeth's Hospital. The doctor was present when the pictures were taken. He put the boy's foot in the position he wanted it, and he identified each film as a picture of the left foot of Johnnie Greene taken on the date marked on the film. The doctor put identifying marks on the films. He testified that he had used the machine on other occasions in the hospital and found it in good working order, and that it was so when the pictures were taken; that the films were of diagnostic character and he used them in his treatment of the case, and from what the doctor testified to it seems clear that the evidence meets the requirements necessary to qualify these films for the purpose of being considered as evidence.

Having considered the questions that have been called to our attention, we are of the opinion that the court was justified in entering judgment on the verdict of the jury. The judgment therefore is affirmed.

JUDGMENT AFFIRMED.

HALL, F.J. AND DENIS E. SULLIVAN, J. CONCUR.

[illegible]

40407

MERRILL F. SHERIDAN,

(Plaintiff) Appellee,

v.

WILLIAM FULLERTON,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

298 I.A. 622³

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order granting the plaintiff's motion for a new trial in a cause which was tried before the court and a jury, resulting in a verdict finding the defendant not guilty.

The action is based upon plaintiff's complaint, which alleges that on or about December 24, 1936, the plaintiff was riding as a guest in a certain motor vehicle which was operated and controlled by one Stanley Lindstrom on a public highway known as Galena Boulevard, in the City of Aurora, County of Kane and State of Illinois, and at the time plaintiff was in the exercise of due care and caution for his own safety; that on this date the defendant was possessed of a certain motor vehicle under its control by its servant Earl Blum, which motor vehicle prior to the occurrence was standing in the highway, but to the south and off the concrete roadway.

That it is alleged the defendant was guilty of certain acts of negligence which directly caused the injury to the plaintiff, which acts are as follows:

(a) The defendant carelessly and negligently failed to yield the right of way to the motor vehicle in which the plaintiff rode as it approached;

(b) The defendant carelessly and negligently caused its said motor truck to enter upon said highway suddenly and closely in front of the motor vehicle in which the plaintiff was riding

THAT

THE

(PLAINTIFF) COMPLAINS

V.

THE

(DEFENDANT) DEFENDANT.

222 I.A. 622

THE

THIS IS AN ACTION BY THE DEFENDANT FOR AN ORDER

THE PLAINTIFF'S MOTION FOR A NEW TRIAL IN A CASE WHICH WAS TRIED

BETWEEN THE COURT AND A JURY, RESULTING IN A VERDICT FINDING THE

DEFENDANT NOT GUILTY.

THE FACTS IN THIS CASE ARE AS FOLLOWS:

ALLEGES THAT ON OR ABOUT DECEMBER 14, 1936, THE PLAINTIFF WAS

TRIPPING AS A GUEST IN A CERTAIN MOTOR VEHICLE WHICH WAS OPERATED

AND CONTROLLED BY ONE EUGENE L. BARNES, COUNTY OF IOWA, STATE

OF IOWA, IN THE CITY OF IOWA, COUNTY OF IOWA, STATE

OF IOWA, AND AT THE TIME SAID PLAINTIFF WAS IN THE MOTOR VEHICLE

HE WAS NOT TRIPPING FOR HIS OWN ACCOUNT, BUT IN CONNECTION WITH

THE BUSINESS OF THE DEFENDANT, AND AT THE TIME SAID PLAINTIFF WAS IN THE MOTOR VEHICLE

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HE WAS NOT TRIPPING FOR HIS OWN ACCOUNT, BUT IN CONNECTION WITH

THE BUSINESS OF THE DEFENDANT, AND AT THE TIME SAID PLAINTIFF WAS IN THE MOTOR VEHICLE

without giving suitable, sufficient and proper notice signal and warning thereof;

(c) The defendant carelessly and negligently and unlawfully started his said motor vehicle which was stopped, standing and parked before said movement could be made with reasonable safety, and

(d) The defendant carelessly and negligently during the day from sunset to sunrise failed to exhibit a lighted lamp so situated as to throw a red light visible for at least five hundred feet in reverse direction from which it was traveling. The facts are that on December 24, 1936, the defendant owned a certain motor truck, which was being operated by Earl Blum in making various deliveries of packages for Sears Roebuck & Company; that the accident happened between eleven and twelve o'clock Christmas Eve, and at the time of the accident, Earl Blum was accompanied by his helper, Joe Zvitkovitz; neither of these young men was familiar with Aurora, and had a delivery to make at 1304 Galena Boulevard in the City of Aurora; that said part of the city is a residential portion of the city, Galena Boulevard running east and west, the boulevard itself being quite wide, but the paved portion consisting of a slab of concrete eighteen feet wide, upon either side of which there was a wide dirt shoulder, the adjacent shoulder at that point being level with the concrete, the residential lots rising in a gradual slope from the edge of the boulevard.

There were trees on both sides of the boulevard, but standing considerably back from the concrete pavement, and near one house known as the Bucon house, on the north side of the boulevard was a large tree, and near it was an electric light pole. Immediately east of it there was a driveway running from the edge of the boulevard back into the Bucon property.

without living outside, and without the house being altered and
erecting there;

(c) The defendant occasionally and occasionally and un-

lawfully started his said motor vehicle which was stopped, standing
and parked before said house and he was with the defendant
safety, and

(d) The defendant occasionally and occasionally during the

day from sunset to sunrise failed to exhibit a license plate as
situated as to show the light visible for at least five hundred
feet in reverse direction from which it was travelling. The facts
are that on December 14, 1934, the defendant drove a certain motor
truck, which was being operated by said driver in said motor
deliveries of packages for Louis Kaufman & Company; that the defendant
happened between eleven and twelve o'clock (between 11:00 and 12:00)

the time of the accident, that this was corroborated by his father,
Joe Litvovitz; neither of these young men was familiar with
the area, and had a delivery to make at the house located in the
city of New York; that said part of the city is a residential section
of the city, which contains many houses and lots, the houses are
itself being quite close, but the paved portion consisting of a strip
of concrete eighteen feet wide, upon either side of which there was
a wide dirt shoulder, the defendant was riding in that narrow strip level
with the concrete, the residential lots being in a general view
from the side of the boulevard.

There were trees on each side of the boulevard, and
standing considerably back from the concrete pavement, and near
one house known as the Bacon house, on the north side of the boula-
vard was a large tree, and near it was an electric light pole.
Immediately east of it there was a fire hydrant running from the side
of the boulevard back into the Bacon property.

The intended place of delivery, 1304 Calena Boulevard, was farther east than the Bucon property, and Earl Blum in driving the truck had passed this address and brought his truck to a stop in front of the Bucon property. Blum and the witness Caroline Bell testified the truck was stopped standing parallel to the concrete with its left wheels on the concrete, and its right wheels on the shoulder of the road. The evidence of other witnesses upon the location of the truck differed in some respects from the testimony of the witnesses just named.

At the time Blum stopped his truck to ascertain the location, he turned the spotlight upon the Bucon house, and sent his helper Joe in to ascertain the number, and he had just returned to the truck and got upon ~~xxxxxxxing~~ the running board, and reported that they had gone too far west and it would be necessary to go back, when Earl Blum started his truck in a general western direction with the intention of ultimately turning around and going back to the address. It was while Blum was in the act of operating his truck that the accident happened.

The plaintiff Merrill F. Sheridan was a barber living at Manteno, Illinois. Stanley Lindstrom, who was driving the automobile, was a young married man living at Rockford, Illinois. Lindstrom and Sheridan's step-son Pfeister, had driven a V-8 Ford from Rockford to Manteno for the purpose of taking Mr. and Mrs. Sheridan back to Rockford for the holidays, and they left Manteno about ten o'clock in the evening with Lindstrom driving and Pfeister sitting in the front seat by Lindstrom. The plaintiff Sheridan was in the right rear seat and his wife sitting next to him in the left rear seat. After the party started upon this journey and had passed Joliet it began to rain. The rain was not very heavy, and at the time of the accident it was described as a drizzle or mist, but they had a windshield wiper in operation and visibility was clear from Lindstrom's car. The headlights on Lindstrom's car were burning and the rays lighted

[illegible]

At the time I was also in the location, I turned the spotlight on the man, and saw his right leg in the water, and he had just returned to the shore and got down xxxxxxxx the running board, and reported that they had gone too far west and it would be necessary to go back, when I then started his truck in a general westerly direction with the intention of ultimately turning around and going back to the house. It was while I was in the act of operating his truck that the accident occurred.

The first of these is the fact that the defendant is a young man living in Chicago, Illinois, and is a member of the Chicago Police Department. The second is the fact that the defendant is a young man living in Chicago, Illinois, and is a member of the Chicago Police Department. The third is the fact that the defendant is a young man living in Chicago, Illinois, and is a member of the Chicago Police Department.

the roadway for more than 200 feet in a fan shape, disclosing the right shoulder of the highway, and a little portion of the eastbound lane of the highway. At the time of the accident, Sheridan was sound asleep, although the other parties in the car were wide awake.

Lindstrom, Pfeister and Mrs. Sheridan all testified that Lindstrom's lights were in operation and the rays from the headlights illuminated the road for a distance of 200 feet, and that the Fullerton truck was not seen by the witnesses in this car until they were within thirty or forty feet of it when it loomed ahead of them as a black object. There was evidence that at that time there was an eastbound car approaching on the other lane, although the distance it was from the truck at or prior to the time of the accident is not made certain. Lindstrom as he approached this truck turned to the right to pass the truck on the shoulder of the road to the north of the concrete, but as his car came up close to the truck it skidded in the rear to the left, bringing the left rear of his car in contact with the right rear of the truck, thus throwing Lindstrom's car to the right, and it skidded along the shoulder at right angles in the direction it was going, and finally came in contact with a telegraph pole near the tree west of the Bucon property so hard that a grooved imprint of the telegraph pole was made on the right side of Lindstrom's car, and the pole itself was cracked, thus cutting off all lights in that section of the city. As a result of this accident, Sheridan, the plaintiff, was injured.

The defendant in his argument states that while he does not concede that the complained of instructions are erroneous, he earnestly contends that the verdict returned by the jury was the only verdict that could have been returned because the plaintiff failed to prove the defendant guilty of any act of negligence charged in the complaint, and further stated, if that is true, then it was the duty of the court to have sustained the defendant's motion for

the roadway for some time and then it was found that the
right shoulder of the roadway, and a little further to the westward
lane of the highway. At the time of the accident, however, the
road was closed, although the other parties to the case were able to
Lindstrom, Elvstrom and Mrs. Lindstrom all testified that
Lindstrom's lights were in operation and the rays from the headlights
illuminated the road for a distance of 100 feet, and that the
reflected light was not seen by the witnesses in this case until they
were within thirty or forty feet of it when it became clear to them
as a black object. There was evidence that at that time there was
an obstruction or something on the other side, although the witnesses
it was from the point as far back as the time of the accident is not
made definite. Lindstrom as he approached this point turned to the
right to pass the truck on the shoulder of the road to the north of
the concrete, but as the car was close to the truck it did not
in the turn to the left, striking the left side of the car in contact
with the right side of the truck, thus causing Lindstrom's car
to the right, and it struck along the shoulder of the road until it
the direction it was going, and it finally came to a stop with a
telephone pole near the turn west of the house property of Mrs. Lindstrom
a grooved turning of the telephone pole was made on the right side
of Lindstrom's car, and the pole itself was damaged, thus causing
off all lights in that section of the city. As a result of this
accident, Lindstrom, the plaintiff, was injured.

The defendant in his argument states that while he was
not opposed that the complaint of investigation was erroneous, he
vehemently denies that the verdict returned by the jury was the
only verdict that could have been returned under the plaintiff's
failure to prove the defendant guilty of any sort of negligence or
in the complaint, and further stated, it was in fact, that it was
the jury at the time he was sustained the defendant's motion for

an instructed verdict at the conclusion of plaintiff's evidence, and the subsequent instructions could not possibly have changed the result. The defendant points to the several acts that are alleged as bearing out his contention that there is no evidence offered tending to sustain the plaintiff's case.

The defendant calls the fact to our attention and admits that the plaintiff charges acts of negligence in these words:

"The defendant carelessly and negligently and unlawfully started his said motor vehicle, which was stopped, standing and parked before said movement could be made with reasonable safety, and

The defendant carelessly and negligently during the period from sunset to sunrise failed to exhibit a lighted lamp so situated as to throw a red light visible for at least five hundred feet in the reverse direction from which it was traveling."

There is evidence that the plaintiff's car was approaching and the headlight rays could be seen for a distance of 200 feet, and if the driver of the truck had looked he could have known from the rays of the headlights that a car was approaching, and the question of whether or not under the circumstances he acted properly in driving the truck upon the concrete at the time of the collision, was for the jury to determine, and we are of the opinion that there is sufficient in the allegations of the complaint and the evidence in the case to justify the court in permitting the jury to pass upon the question. Now then, if there was evidence which would indicate that there was negligence, and as we view the record the facts were in dispute, it became important that the jury be properly instructed, and this is admitted by the defendant when he states in his brief in this language: "Right at the outset of this part of our discussion, we can concede that if the evidence in this case was close, it was very important that the jury be properly instructed." So, from the conclusion we have reached upon the question as to whether there was a proper allegation and evidence to support it, the court is required to consider the instructions that were given as to whether there was error which would justify the trial court in granting a new trial.

leading to obtain the plaintiff's name.

on behalf of the defendant that there is no evidence of any

result. The defendant further to the plaintiff's name that the defendant

the defendant's name would not be included in the defendant's

an interest which is the defendant's name.

The defendant was a white male, approximately 35 years of age, 5'10" tall, 175 lbs., with brown hair and blue eyes. He was wearing a dark jacket and light-colored pants. He was seen running from the scene of the crime, which was located in the area of the intersection of 1st and 2nd Streets, near the corner of 1st and 2nd Streets. The defendant was seen running towards the intersection of 1st and 2nd Streets, near the corner of 1st and 2nd Streets. The defendant was seen running towards the intersection of 1st and 2nd Streets, near the corner of 1st and 2nd Streets.

There is evidence that the defendant's car was in the vicinity of the bridge at the time of the shooting, and the defendant says that he was in the car at the time of the shooting. If the driver of the truck had indeed had a license, he would have been able to identify the car of the defendant as a car of the defendant, and the question of whether or not under the circumstances he acted properly in driving the car would have been decided by the law of the jurisdiction. As for the fact of the shooting, and as for the defendant's testimony, the defendant in the affidavit of the defendant and the witness in the case to testify the court in deciding the jury to hear the case. The question, however, is that, if there was evidence which would indicate that there was negligence, and as to the facts of the case, were in dispute, it became incumbent on the jury to hear the testimony, and this is required by the defendant's right to cross-examine his trial in this language: "Right at the outset of this case, our disclaimer, we now announce that if the witness in this case is alone, it was very important that the jury be properly instructed." So, from the conclusion we have reached upon the question as to whether there was a proper allegation and evidence as to the facts, the court is required to consider the instructions that were given to the jury and to state what would justify the jury in finding the defendant a law abiding citizen.

The court upon the request of the defendant gave the following instruction to the jury:

"The court instructs you that the rights of persons operating motor vehicles upon the public highway are co-equal, that is to say, it is the duty of all persons so operating such motor vehicles to exercise ordinary care for the safety of the other motor vehicle, and each driver should be on the look out for other cars either moving or standing in the highway."

Recalling the evidence in the record as to the operation of the car at the time or prior to the accident, the truck was standing on the dirt shoulder of the pavement and just when the car in which the plaintiff was riding approached the point where the defendant's truck was standing, the driver of this truck started the car upon the cement parkway and the location of the car in which the plaintiff was riding was so close to this movement of the defendant's truck that it was necessary for the driver Lindstrom to try to avoid the collision which was imminent from the fact that this approaching car was close to the truck when it was being moved out upon the cement roadway. The plaintiff turned his car to the right in order to pass the truck, when the collision took place, as we have indicated in the statement of facts in this opinion. It was the duty of the driver of the stopped and parked truck not to move the truck until it could be done with safety, and the defendant having failed to control his truck in this respect, the court erred in giving the instruction we have quoted. (Ch. 95-1/2, Par. 161, Sec. 64, Ill. Rev. Stats. 1937) And from that portion of the instruction setting forth that the rights of persons operating motor vehicles upon the public highway are co-equal, under the facts as we have detailed them, it would seem that the approaching automobile should have had the right-of-way in order to avoid a collision by the movement of this truck upon the public highway.

There are other instructions complained of, but the one we believe we must consider is the instruction which the court gave in these words:

The court upon the request of the defendant gave the

following instruction to the jury:

"The court instructs you that the right of way of an operating motor vehicle upon the public highway is determined by the duty of all persons to exercise due care for the safety of such motor vehicles to establish ordinary care for the safety of the other motor vehicle, and each driver should be on the look out for other cars either moving or standing in the highway."

Also find the evidence in the report as to the position of

the car at the time of the accident, the truck was standing on the right shoulder of the highway and just when the car in which the plaintiff was riding approached the right wheel and when the truck was standing, the driver of this truck started the car moving

the cement driveway and the location of the car in which the plaintiff

was riding was so close to the movement of the defendant's truck

that it was necessary for the driver of the truck to try to avoid the

collision which was imminent from the fact that the truck was moving

was close to the truck when it was being moved and upon the cement

driveway. The plaintiff turned his car so as to avoid the truck

the truck, when the collision took place, as was indicated in

the statement of facts in this opinion. It was the duty of the driver

of the stopped and parked truck not to move the truck until it could

be done with safety, and the defendant's car failed to exercise due

truck in this respect, the court erred in giving the instruction as

have noted. (In 28-17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

from that portion of the instruction setting forth that the right of

persons operating motor vehicles upon the public highway is determined

under the facts as we have detailed them, it would seem that the

prohibitive instruction should have had the right-of-way in order to avoid

a collision by the movement of this truck upon the public highway.

There are other instructions complained of, but the ones we

believe we must consider in the instruction which the court gave in

these words:

"The court instructs the jury that one method of impeaching a witness is to show that such witness made a statement prior to the trial inconsistent with such witness' testimony upon the trial, and if you believe that in this case any witness has been so impeached, then you should take such fact into consideration together with all of the other facts and circumstances surrounding such person's testimony in determining the credibility of such witness and the weight to be given to his or her testimony."

The instruction was erroneous in that the court instructed the jury that if the witness made a statement prior to the trial inconsistent with such witness' testimony upon the trial, then the jury was to take such fact into consideration in determining the credibility of such witness. It was erroneous for this reason: the evidence that there was an effort to impeach must be upon a matter material to the issues involved in the litigation, and in discussing an instruction in Matthews v. Granger, 196 Ill. 164, the court said:

"Under this instruction the witness could be treated as impeached by showing his contradictory statement in a matter material at the former trial but not material at this trial. * * * 'A witness cannot be discredited simply on the ground of an erroneous statement. It is only where the statements of a witness are wilfully and corruptly false in regard to material facts that the jury are authorized to discredit the entire testimony. The most candid witness may innocently make an incorrect statement, and it would be monstrous to hold that his entire testimony, for that reason, should be disregarded.'"

Applying the rule as outlined in this decision of the Supreme Court, it seems but a reasonable conclusion that the matter criticized as being inconsistent was upon a fact immaterial to the issues in the case, and for that reason we believe the court erred.

Other instructions were given, but we are of the opinion that what we have stated is sufficient to justify the trial court's allowing plaintiff's motion for a new trial. The order granting a new trial is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

AUGUSTUS H. GRUNEWALD, JR., Administrator
 of the Estate of AUGUSTUS H. GRUNEWALD,
 Deceased, EMMA B. GRUNEWALD, LOUISE G.
 HOPKINS, MARIE G. FITCH, MARTHA C. DAKIN,
 LUCILLE R. GRUNEWALD, MARQUERITE A. GRUNEWALD,
 AUGUSTUS H. GRUNEWALD, JR., and CARL F.
 GRUNEWALD,

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Appellees,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

298 I.A. 622⁴

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant brings this appeal from a judgment which was entered in the Circuit Court in favor of plaintiffs for \$24,084.14, as damages to property belonging to plaintiff located at 12-14 East Kinzie street, Chicago, Illinois. The damages alleged were the result of the construction of the north viaduct or approach to the bridge spanning the Chicago river at Wabash avenue, the change of grade of the streets, sidewalks and an alley adjacent to the plaintiffs' property as an incident to the construction of the public work, and the construction of a ramp in the south half of East Kinzie street.

The cause was tried before a jury who returned a verdict in favor of plaintiffs and as we have already stated assessed the damages at \$24,084.14, and by a special finding in response to an interrogatory, fixed the amount awarded for a particular element of damages at \$15,000.00.

Two judgments were entered on the verdict, each for the full amount. The first was entered when the verdict was returned, and the second when the court overruled the defendant's motion for a new trial and in arrest of judgment. This appeal is prosecuted from both judgments. No issue is raised as to the pleadings.

ADAMANTLY DENIES THAT HE HAS ANY INTEREST IN THE PROPERTY OF THE DEFENDANT. HE CLAIMS THAT HE HAS NO KNOWLEDGE OF THE PROPERTY AND THAT HE HAS NO INTEREST IN IT. HE CLAIMS THAT HE HAS NO KNOWLEDGE OF THE PROPERTY AND THAT HE HAS NO INTEREST IN IT.

THE COURT HAS CONSIDERED THE EVIDENCE AND HAS REACHED THE FOLLOWING CONCLUSIONS:

1. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO INTEREST IN THE PROPERTY.

2. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO KNOWLEDGE OF THE PROPERTY.

3. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO INTEREST IN THE PROPERTY.

4. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO KNOWLEDGE OF THE PROPERTY.

5. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO INTEREST IN THE PROPERTY.

6. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO KNOWLEDGE OF THE PROPERTY.

7. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO INTEREST IN THE PROPERTY.

8. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO KNOWLEDGE OF THE PROPERTY.

9. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO INTEREST IN THE PROPERTY.

10. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO KNOWLEDGE OF THE PROPERTY.

11. THE DEFENDANT HAS NOT PROVEN THAT HE HAS NO INTEREST IN THE PROPERTY.

After the appeal was filed in this court, the plaintiff made a motion to transfer the cause to the Supreme Court for want of jurisdiction here. The motion was reserved to the hearing.

It is contended on behalf of plaintiff that although no property was taken, a condemnation suit is necessary in order to determine the damages resulting from a public improvement and appeals from such decisions, under the statute, should be taken to the Supreme Court.

In the recent case of The People v. Kingery, 369 Ill. 289, the Supreme Court held that it is necessary that the right of eminent domain be invoked to determine the damages to the property as the result of a public improvement even where no property has been taken. That being true, this court would be without jurisdiction to determine this cause and for that reason the motion to transfer this cause to the Supreme Court, where the appeal properly lies, is granted and the case is transferred to that court.

MOTION GRANTED AND CAUSE IS TRANSFERRED TO
THE SUPREME COURT.

HALL, P.J. AND HERBEL, J. CONCUR.

After the appeal was filed in this court, the plaintiff made a motion to transfer the cause to the Supreme Court for want of jurisdiction here. The motion was reserved to the hearing.

It is contended on behalf of plaintiff that although no

property was taken, a condemnation suit is necessary in order to determine the damages resulting from a public improvement and awards from such decisions, under the statute, should be taken to the Supreme Court.

In the recent case of The People v. Sweeney, 303 Ill. 183,

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MOTION GRANTED AND CAUSE IS TRANSFERRED TO
THE SUPREME COURT

WILLIAM J. ANDERSON, J. CLERK.

40234

CHICAGO LAW SCHOOL,
Appellant,

vs.

FIRST NATIONAL BANK OF CHICAGO
(successor by consolidation to
First Union Trust and Savings
Bank), as Administrator of the
Estate of Jean J. DuBois,
deceased, and DOROTHEA TOBIAS
BRUNSWICK,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

298 I.A. 623¹

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing its complaint for want of equity. It asked for an accounting and to have a constructive trust declared, alleging that Jean J. DuBois, alias John J. Tobias, deceased, while acting as treasurer of plaintiff, converted funds for his own use; answers were filed and the cause was referred to a master who took testimony and found, among other things, that this action was instituted by Amabel A. Anderson under the name of the Chicago Law School, a corporation, without any authority from said corporation; that the corporation is not the real party in interest, and recommended that the complaint be dismissed; objections and exceptions to the master's report were filed and overruled and the report was approved and decree entered dismissing the complaint, from which plaintiff appeals.

The master and chancellor were unable to find from the evidence whether the Chicago Law School was conducted as a corporate enterprise pursuant to its charter or whether its incorporators abandoned its charter and the institution was conducted as an enterprise for profit by John J. Tobias. We think the evidence shows conclusively that it was conducted as a private enterprise by Tobias.

CHICAGO LAW SCHOOL,
Appellant,

vs.

FIRST NATIONAL BANK OF CHICAGO
(successor by consolidation to
First Union Trust and Savings
Bank), as Administrator of the
Estate of Jean T. Tobias,
deceased, and DOROTHY TOBIAS
ERUSALIMSKY,

Appellees.

APPELLATE COURT
COURT OF APPEALS
JULY 1933

333 I.A. 623

MR. PRESIDING JUSTICE McGRATH delivered the opinion of the court.

Plaintiff appeals from an order dismissing its complaint for want of equity. It asked for an accounting and to have a constructive trust declared, alleging that Jean T. Tobias, since John T. Tobias, deceased, while acting as treasurer of plaintiff, converted funds for his own use; answers were filed and the same was referred to a master who took testimony and found, among other things, that this action was instituted by Isabel A. Tobias under the name of the Chicago Law School, a corporation, without any authority from said corporation; that the corporation is not the real party in interest, and recommended that the complaint be dismissed; objections and exceptions to the master's report were filed and overruled and the report was approved and decree entered dismissing the complaint, from which plaintiff appeals.

The master and chancellor were unable to find from the evidence whether the Chicago Law School was conducted as a corporate enterprise pursuant to its charter or whether its incorporators abandoned its charter and the institution was conducted as an enterprise for profit by John T. Tobias. We think the evidence shows conclusively that it was conducted as a private enterprise by Tobias.

January 16, 1896, a corporation not for pecuniary profit was organized under the laws of Illinois, under the name of Chicago Law School; its incorporators were John J. Tobias, Theron M. Bates and George W. Warvelle; this is the only time Bates and Warvelle appear; from that time on the institution was conducted under the exclusive control of Tobias; no directors were elected; no minutes of any corporation were kept and apparently no meetings of any purported board of directors were held. There was testimony, undisputed, by reputable attorneys at law at this bar that they were employed for many years as teachers in the school by Mr. Tobias, and each of these men testified that during this entire period they never heard of any board of directors; that the school was in the exclusive control of Tobias. Walter Schmauch, an attorney, testified that he was connected with the school from 1908 to 1931; that while he signed the diplomas as secretary of the school he was never elected secretary and was merely appointed by Tobias, who "owned" the Chicago Law School.

In 1930 Tobias changed his name to DuBois. In 1930 the school had received notice that the State Board of Bar Examiners were considering withdrawing credit standing from the school. Harold Snyder, a Chicago attorney, was an instructor at the school and he attended a meeting of the Board of Examiners and was told that if he were given a free hand to raise the scholastic standards of the school it would be put on probation. After meeting with the Bar Examiners Snyder talked with DuBois and asked him who constituted the directors of the school and if they had filed a statement in the county recorder's office as to who were the directors; DuBois replied he did not believe he had and asked Snyder's advice as to who should be directors, and it was decided that the faculty should be the directors, and on August 13, 1930, the members of the faculty,

January 16, 1896, a corporation not for pecuniary profit was organized under the laws of Illinois, under the name of Chicago Law School; its incorporators were John T. Tobias, Theron W. Bates and George W. Warrville; this is the only time Bates and Warrville appear; from that time on the institution was conducted under the exclusive control of Tobias; no directors were elected; no minutes of any corporation were kept and apparently no meetings of any purported board of directors were held. There was testimony, unadmitted, by reputable attorneys at law at this bar that they were employed for many years as teachers in the school by Mr. Tobias, and each of these men testified that during this entire period they never heard of any board of directors; that the school was in the exclusive control of Tobias. Walter Schmechel, an attorney, testified that he was connected with the school from 1908 to 1931; that while he signed the diplomas as secretary of the school he was never elected secretary and was merely appointed by Tobias, who "owned" the Chicago Law School.

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all of whom had been hired by DuBois, met and elected as directors DuBois, Snyder and F. A. Hughes.

Schmauch testified that in 1930 or 1931 a Miss Amabel Anderson told him she contemplated purchasing the law school from Tobias and asked Schmauch, if she did so, whether he would continue to act as dean, who responded that he had no objection.

February 9, 1931, Tobias executed a bill of sale of all his right, title and interest in and to the law school to H. V. Snyder, and at the same time signed his resignation from the board of directors. Snyder testified that within a few days after February 9th he received from Miss Anderson \$1500, the purchase price, and gave her a bill of sale conveying the school to her. Thereafter Miss Anderson took charge of the school and Tobias ceased to have any connection with it.

June 8, 1932, Tobias, also known as DuBois, was adjudged mentally incompetent by the Probate Court of Cook county, and the First Union Trust and Savings Bank of Chicago was appointed his conservator. July 10, 1932, DuBois died and an order was entered in the Probate Court granting leave to the conservator to continue to administer the ward's estate.

In 1934 the Board of Bar Examiners removed the Chicago Law School from the list of accredited schools. From 1902 to 1931 Tobias was in full possession of the school and ran it as his own private property without any board of directors or any corporate organization. Plaintiff introduced in evidence a letter written by Tobias in 1928 protesting against the revocation of a radio license of the Chicago Law School by the Federal Radio Commission, on the ground that the law school was a private institution and that for 33 years he had been elected the chief administrative officer by its board of trustees. The statement that he was elected by a board of trustees was manifestly untrue and the result of a disordered mind. One of plaintiff's witnesses, a Mr. Jayne, an

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attorney, testified that in February, 1931, Tobias was practically insane.

Plaintiff undertook to prove that corporate minutes were kept. The only minutes produced prior to the sale to Miss Anderson were two loose sheets recording a purported meeting of the directors. Mr. Schmauch, who signed these minutes, testified that he did so as a mere matter of form at the request of Tobias, who was the "sole owner of the school".

The facts in this case are very much like those involved in Svenska Nat. F. i C. v. Swedish Nat. Assn. et al. 205 Ill. App. 428, 433-34, (certiorari denied by the Supreme court) where it was held that where an Illinois not-for-profit corporation had failed to hold meetings, elect officers or comply with the laws, and where an individual had conducted a private business under the name of the corporation, the corporation had ceased to exist. In that case the court found that the defendant had conducted a private business under the corporate name of the defendant association, and held that the master who heard the evidence and the chancellor who affirmed his report "had ample reason for the finding that the defendant corporation had ceased to exist some years before the bill was filed". In In re Hool Realty Co. 288 (2d) 334, 338, (certiorari denied by the Supreme Court of the United States) it was held that an Illinois corporation "had dissolved in fact, at least in equity," saying that corporations may dissolve in numerous ways. They may cease to function, hold no corporate meetings, have no officers or directors and no stockholders available to serve as directors or officers. These facts are present in the instant case. The plaintiff corporation held no meetings, elected no directors or officers. Tobias operated the school as his private business venture. This is not the case of the forfeiture of a charter but rather the loss of a charter through disuse. Board of

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directors or officers. Tobias operated the school as his private
business venture. This is not the case of the forfeiture of a
charter but rather the loss of a charter through abuse. Board of

Education v. Bakewell, 122 Ill. 339, 350.

As to the claim of a constructive trust the master found that from March 9, 1918, up to April 5, 1927, various amounts of money were withdrawn from the bank account carried in the name of the Chicago Law School and used by Tobias personally, for purposes extraneous to the purpose of the school. These amounts aggregate something over \$19,000. Both the master and the chancellor found that the record did not disclose whether said withdrawals were made rightfully or wrongfully; that the record did not disclose whether these amounts were the property of the corporation, and there was no evidence whether the withdrawals were pursuant to authority granted by the corporation or whether the moneys had been repaid by Tobias.

The report and the decree find that a bill of sale of the institution was executed to Amabel A. Anderson and that the only privity between Miss Anderson and the Chicago Law School, chartered in 1896, is dependent upon the bills of sale, which did not effect a transfer of any cause of action belonging to the corporation or of any property right of the corporation to the grantee, and that they were ineffectual to constitute the grantee, Miss Anderson, either a member, an officer or an agent of the corporation, and that it was the intent of the parties to the bills of sale that DuBois, or Tobias, should thereby transfer whatever property right he had, personally, in the Chicago Law School.

The record shows that on January 31, 1917, Tobias and Florence King bought real estate in Glencoe; subsequently Tobias acquired the half interest of Florence King, and on October 15, 1929, sold the property for \$49,145.89. The complaint alleges that this money belonged to plaintiff and was in the hands of Tobias as the fiduciary agent of plaintiff. There is no evidence that Tobias paid any part of the original purchase price of the

Education v. Bakewell, 122 Ill. 339, 350.

As to the claim of a constructive trust the master found that from March 9, 1918, up to April 5, 1927, various amounts of money were withdrawn from the bank account carried in the name of the Chicago Law School and used by Tobias personally, for purposes extraneous to the purpose of the school. These amounts aggregate something over \$19,000. Both the master and the chancellor found that the record did not disclose whether said withdrawals were made rightfully or wrongfully; that the record did not disclose whether these amounts were the property of the corporation, and there was no evidence whether the withdrawals were pursuant to authority granted by the corporation or whether the moneys had been repaid by Tobias.

The report and the decree find that a bill of sale of the institution was executed to Amabel A. Anderson and that the only privity between Miss Anderson and the Chicago Law School, chartered in 1906, is dependent upon the bill of sale, which did not effect a transfer of any cause of action belonging to the corporation or of any property right of the corporation to the grantees, and that they were ineffectual to constitute the grantees, Miss Anderson, either a member, an officer or an agent of the corporation, and that it was the intent of the parties to the bill of sale that Dubois, or Tobias, should thereby transfer whatever property right he had, personally, in the Chicago Law School.

The record shows that on January 31, 1917, Tobias and Florence King bought real estate in Glenview; subsequently Tobias acquired the half interest of Florence King, and on October 15, 1929, sold the property for \$49,145.89. The complaint alleges that this money belonged to plaintiff and was in the hands of Tobias as the fiduciary agent of plaintiff. There is no evidence that Tobias paid any part of the original purchase price of the

Glencoe property in 1917 by the use of checks of the law school. As we have seen, the record shows that the first money withdrawn from the Chicago Law School bank account was on March 9, 1918. There is no evidence whatever as to what Tobias did with the money received from the sale of the Glencoe property. Without detailing other transactions, it is sufficient to say that the conclusion of any constructive trust results only in surmise.

In Streeter v. Gamble, 298 Ill. 332, 335-36, the court said: "Where such a trust ex maleficio is alleged, the facts which raise the trust must be proved by clear and convincing evidence. The evidence to prove the trust must be clear, strong, unequivocal and unmistakable and lead to but one conclusion. *** there is added force to the rule where the delay has been so long that the death of witnesses and the loss of evidence render it practically impossible to make a defense." In Winkelman v. Winkelman, 307 Ill. 249, 263-64, in reversing a decree establishing a constructive trust, the court said: "If the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of the trust it is not sufficient to support a decree declaring and enforcing the trust." See also Rubin v. Midlinsky, 321 Ill. 436; Neagle v. McMullen, 334 Ill. 168; Catherwood v. Morris, 345 Ill. 617.

In 51 Harvard Law Review 1373, 1389, et seq., it is suggested that the owner of all the stock in a business corporation has the right to use all the corporate assets for his own purposes if there are no creditors. See also Hanson Sheep Co. v. Farmers & Traders' State Bank, 53 Mont. 324, 336. Meagher v. Harrington, 78 Mont. 457, 474-76, involved a bill to declare a constructive trust of certain stock held by the administratrix of the estate of the deceased president of a corporation on the theory that the stock had been purchased with funds of the corporation. The facts there are analogous to the facts in the instant case. Similar allegations

Glencoe property in 1917 by the use of checks of the law school. As we have seen, the record shows that the first money withdrawn from the Chicago Law School bank account was on March 9, 1918. There is no evidence whatever as to what Tobias did with the money received from the sale of the Glencoe property. Without detailing other transactions, it is sufficient to say that the conclusion of any constructive trust results only in surprise.

In Streeter v. Gamble, 238 Ill. 332, 355-56, the court said: "Where such a trust ex maleficio is alleged, the facts which raise the trust must be proved by clear and convincing evidence. The evidence to prove the trust must be clear, strong, uncontroverted and unmistakable and lead to but one conclusion. *** there is added force to the rule where the delay has been so long that the death of witnesses and the loss of evidence render it practically impossible to make a defense." In Winkelman v. Winkelman, 307 Ill.

249, 263-64, in reversing a decree establishing a constructive trust, the court said: "If the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of the trust it is not sufficient to support a decree declaring and enforcing the trust." See also Hubin v. Hubin, 321 Ill. 436; Neale v. Neale, 324 Ill. 168; Gatberwood v. Morris, 345 Ill. 617. In 21 Harvard Law Review 1373, 1389, et seq., it is suggested

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were made in that case to those in the present complaint. After referring to transactions which might lead to a conjecture or surmise, it was held that to establish a constructive trust the proof must be practically free from doubt. The holding of the master and of the chancellor in the present case that the evidence failed to prove a constructive trust was fully justified.

Other points are made upon which we express no opinion. We are impressed by the statement in the brief of the defendants, that this suit is an attempt to make \$67,000 out of an investment of \$1500.

We see no reason to disagree with the conclusion of the chancellor, and the decree is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

were made in that case to those in the present complaint. After referring to transactions which might lead to a conjecture or surmise, it was held that to establish a constructive trust the proof must be practically free from doubt. The holding of the master and of the chancellor in the present case that the evidence failed to prove a constructive trust was fully justified.

Other points are made upon which we express no opinion. We are impressed by the statement in the brief of the defendants, that this suit is an attempt to make \$37,000 out of an investment of \$1200.

We see no reason to disagree with the conclusion of

the chancellor, and the decree is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

40264

ANNA WAGNER,
Appellee,

vs.

JOSEF WAGNER,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

298 I.A. 623²

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree awarding plaintiff a divorce. The principal question presented in the briefs is whether plaintiff condoned the offenses claimed.

The complaint, filed June 17, 1935, alleged that plaintiff had married defendant in Czechoslovakia on May 6, 1899, and lived with him as his wife until June 3, 1935; that eight children were born of the marriage; that the parties occupied their home in joint tenancy; that they owned several other parcels of real estate in Cook County and also a dairy business; charges of extreme and repeated cruelty were specified in the complaint; she asked that the marriage be dissolved, that defendant be restrained from transferring any of his property and that the property of the parties be divided; she also asked for alimony and solicitors' fees. Defendant answered, denying the substantial allegations of the complaint touching the acts of cruelty and the property rights.

Trial was had before Judge Harry B. Miller, who entered an order April 4, 1936, finding with the allegations of the complaint, that plaintiff was entitled to a decree of divorce, but the court reserved the question of alimony and money questions and the respective property rights of the parties until the further order of the court "and the entry of a decree of divorce herein..." The reserved questions were referred to Wirt E.

ANNA WAGNER,
Appellee,

vs.

JOSEPH WAGNER,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE MCKINNEY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree awarding plaintiff a divorce. The principal question presented in the case is whether plaintiff condoned the offenses claimed.

The complaint, filed June 17, 1935, alleged that plaintiff had married defendant in Czechoslovakia on May 6, 1933, and lived with him as his wife until June 3, 1935; that eight children were born of the marriage; that the parties occupied their home in joint tenancy; that they owned several other parcels of real estate in Cook County and also a dairy business; charges of extreme and repeated cruelty were specified in the complaint; she asked that the marriage be dissolved, that defendant be restrained from transferring any of his property and that the property of the parties be divided; she also asked for alimony and solicitors' fees. Defendant answered, denying the substantial allegations of the complaint touching the acts of cruelty and the property rights.

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an order April 4, 1936, finding with the allegations of the complaint, that plaintiff was entitled to a decree of divorce, but the court reserved the question of alimony and money questions and the respective property rights of the parties until the further order of the court "and the entry of a decree of divorce herein..." The reserved questions were referred to Will E.

Humphrey, Master in Chancery, to take proof and report.

October 13, 1937, defendant filed his cross-petition alleging that during the pendency of the proceedings, no decree of divorce having been entered, plaintiff on July 4, 1937, voluntarily returned to the home and resumed full marital relations with defendant, and from that date to September 19, 1937, they lived and cohabited together as husband and wife, and by reason of these facts she has condoned the acts of defendant and has abandoned her rights to any further proceedings against him.

Judge Miller having deceased, the cause was assigned to Honorable James F. Fardy, who entered an order that the cross-petition of defendant stand as a further answer to the complaint of plaintiff. Plaintiff filed an answer to this cross-petition asserting that the order of April 4, 1936, entered by Judge Miller, was a decree of divorce, and that the court had no jurisdiction in October, 1937, to grant leave to defendant to plead condonation; denied generally the claim of condonation and asserted that the reason she returned to the home was that James Wagner, an invalid son of the parties was stricken with a serious malady, requiring immediate medical and hospital attention; that after he was removed to a hospital, defendant promising to pay the expenses out of the income of the dairy, (the joint property of plaintiff and defendant) defendant refused to defray the expenses and sent messages to plaintiff to the effect that unless she returned home he would cease payments on account of James Wagner's illness; that plaintiff, during the time she was at the home, never at any time cohabited with defendant or occupied the same room with him; that she stayed only long enough to have the expenses of James Wagner, the son, paid, and when he recovered sufficiently to return home she immediately left her home, in which she owns an undivided one-half interest by joint tenancy; that during this

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was a decree of divorce, and that the court had no jurisdiction

asserting that the order of April 4, 1936, entered by Judge Miller,

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Honorable James F. Farby, who entered an order that the cross-

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Humphrey, Master in Chancery, to take proof and report.

time she believed she was divorced from defendant, and that upon his soliciting her to resume marriage relations with him she told him she would do so only if they were remarried and proper arrangements concerning the property were made.

Judge Fardy took evidence on the claim of condonation and held with plaintiff, and on March 30, 1938, entered a decree incorporating the finding of April 4, 1936, of Judge Miller and found that plaintiff had not condoned the acts of the defendant of which he had been found guilty and ordered and adjudged that the bonds of matrimony between plaintiff and defendant "be and the same are hereby dissolved", reserving only the question of moneys and the respective property rights of the parties. This appeal is from that decree.

The court could properly find that plaintiff returned to the home because of the threat of defendant to stop payment of the medical and hospital bills of their son, ^{James} who was apparently a favorite child of plaintiff. There is ample evidence to support the conclusion that during this time plaintiff did not have marital relations with defendant but occupied a separate room. There was conflict in some of the evidence. Defendant testified that he cohabited with plaintiff, which was earnestly denied by her. It is apparent that plaintiff thought she was already divorced. This is indicated by her statement that she would not resume relations with defendant until they had been remarried. The story of her daily program would indicate that she did not constantly see the defendant, who arose very early; he testified about half past three, going to the dairy; that in the meantime plaintiff prepared something for him to eat, which he ate about 4:30 and then went to bed. Plaintiff's age at the hearing was 65 years, and defendant's 67 years.

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Counsel for both parties present in their briefs a mass of details which, it is said, support their respective theories. It would be of no value to narrate these. The trial court was justified in concluding that plaintiff had returned to her home because of the threats of defendant to refuse to pay the medical bills of the son James; that while in the home she acted as a housekeeper, with no intention of condoning the guilt of defendant as found by Judge Miller. In Lindsay v. Lindsay, 226 Ill. 309, it was held that the intention of the parties controls in such a case. See also Brown v. Brown, 164 Ill. App. 589, and Phillips v. Phillips, 1 Ill. App. 245. And in Mattes v. Mattes, 121 Ill. App. 400, it was held that the fact the wife, after knowledge of the adulterous conduct of her husband, continues to reside with him in the family homestead, does not establish condonation where she occupied a separate room and denies him cohabitation. In Klekamp v. Klekamp, 275 Ill. 98, 103, it was held that the defense of condonation is an affirmative one and must be established by a preponderance of the evidence.

Here the trial court, who saw the witnesses and heard them testify, is in a much better position than are we to pass upon their credibility, and we cannot say that the conclusion of the court to accept the version of the plaintiff is against the weight of the evidence.

Much of the briefs is devoted to the contention of plaintiff that the order entered by Judge Miller on April 4, 1936, is a final, appealable decree of divorce, and that Judge Fardy had no jurisdiction in October, 1937, many terms thereafter, to permit the filing by defendant of his so-called cross-petition asserting for the first time the defense of condonation. This is rather a close question. The language of Judge Miller's order is that the

Counsel for both parties present in their briefs a mass of details which, it is said, support their respective theories. It would be of no value to narrate these. The trial court was justified in concluding that plaintiff had returned to her home because of the threats of defendant to refuse to pay the medical bills of the son James; that while in the home she acted as a housekeeper, with no intention of committing the guilt of defendant as found by Judge Miller. In Winkley v. Winkley, 280 Ill. 309, it was held that the intention of the parties controls in such a case. See also Brown v. Brown, 184 Ill. App. 689, and Phillips v. Phillips, 1 Ill. App. 346. And in Watts v. Watts, 121 Ill. App. 400, it was held that the fact the wife, after knowledge of the adulterous conduct of her husband, continues to reside with him in the family home, does not establish cohabitation where she occupied a separate room and denies him cohabitation. In Kirkamp v. Kirkamp, 273 Ill. 98, 103, it was held that the defense of condonation is an affirmative one and must be established by a preponderance of the evidence.

Here the trial court, who saw the witnesses and heard them testify, is in a much better position than are we to pass upon their credibility, and we cannot say that the conclusion of the court to accept the version of the plaintiff is against the weight of the evidence.

Much of the briefs is devoted to the contention of plaintiff that the order entered by Judge Miller on April 4, 1936, is a final, appealable decree of divorce, and that Judge Barry had no jurisdiction in October, 1937, when he entered an order to permit the filing by defendant of his so-called cross-petition asserting for the first time the defense of condonation. This is rather a close question. The language of Judge Miller's order is that the

court reserves the determination of the property rights of the respective parties "until the further order of this court and the entry of a decree of divorce herein", indicating that the court reserved the formal order dissolving the marriage relation until a later date. However this may be, we do not pass upon the question, preferring to rest our conclusion upon the decision of Judge Fardy that the defense of condonation was not proved.

The order appealed from is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

court reserves the determination of the property rights of the respective parties "until the further order of this court and the entry of a decree of divorce herein", indicating that the court reserved the formal order dissolving the marriage relation until a later date. However this may be, we do not pass upon the question, preferring to rest our conclusion upon the decision of Judge Hardy that the defense of condonation was not proved. The order appealed from is therefore affirmed.

APPROVED.

Matchett and O'Connor, JJ., concur.

MARGARET DELYDA, as Administratrix
of the Estate of Anton Delyda,
Deceased,

Appellant,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

298 I.A. 623³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on a life insurance policy issued by defendant company September 27, 1927 to her husband, Anton Delyda. He died August 23, 1934. There was a jury trial and a verdict and judgment in plaintiff's favor for \$2,043.99. Defendant insurance company appealed to this court where, upon consideration, the judgment was reversed and the cause remanded for another trial, Delyda v. Metropolitan Life Insurance Company #39531. The case was again tried before a judge and jury and there was again a verdict in plaintiff's favor for \$2,150. Defendant made a motion for a new trial and judgment notwithstanding the verdict. The court sustained the latter motion and plaintiff appeals.

The controlling question in the case on each trial was whether the policy had lapsed for non-payment of premium on September 27, 1933, it being conceded that all premiums had been paid up to that date.

Plaintiff's position was that under the terms of the policy, and what had been done by the parties, the insurance was in full force and effect at the time of the insured's death. Defendant's position on both trials was that the policy lapsed for non-payment of premium September 27, 1933.

MARGARET DELYDA, as administratrix
of the Estate of Anton Delyda,
Deceased,

Appellant,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

MUNICIPAL COURT

OF CHICAGO.

APPEAL FROM

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on a life insurance policy issued by defendant company September 27, 1932 to her husband, Anton Delyda. He died August 23, 1934. There was a jury trial and a verdict and judgment in plaintiff's favor for \$2,043.92. Defendant insurance company appealed to this court where, upon consideration, the judgment was reversed and the cause remanded for another trial, Delyda v. Metropolitan Life Insurance Company #39331. The case was again tried before a judge and jury and there was again a verdict in plaintiff's favor for \$2,150. Defendant made a motion for a new trial and judgment notwithstanding the verdict. The court sustained the latter motion and plaintiff appeals.

The controlling question in the case on each trial was whether the policy had lapsed for non-payment of premium on September 27, 1932, it being conceded that all premiums had been paid up to that date.

Plaintiff's position was that under the terms of the policy, and what had been done by the parties, the insurance was in full force and effect at the time of the insured's death. Defendant's position on both trials was that the policy lapsed for non-payment of premium September 27, 1932.

In our opinion on the former appeal, we analyzed the provisions of the policy in considerable detail, and after stating the facts said: "These contentions raise issues of fact, which make necessary a review of the evidence." We then set forth a detailed analysis of the evidence and said: "The merits of plaintiff's case are based upon the assertion as a fact that the loan value of the policy at and after its lapse for failure to pay premium on September 27, 1933, exceeded the amount of the premium due upon the policy in order to carry it another year." We then discussed more of the evidence and in concluding said: "The verdict is clearly and manifestly against the weight of the evidence," and we reversed the judgment and remanded the case.

The evidence on the second trial is substantially the same as the evidence in the record on the first trial, and the contentions made in this court are substantially the same on both appeals. In the briefs there is again a detailed discussion of the evidence. In these circumstances we think it obvious that the trial court erred in sustaining defendant's motion for a judgment notwithstanding the verdict. On such a motion the trial judge is not warranted in weighing the evidence. Emge v. Ill. Cent. R.R. Co., 297 Ill. App. 344; Malewski v. Mackiewicz, 282 Ill. App. 593; Gardiner v. Richardson, 293 Ill. App. 40.

There have been two verdicts in plaintiff's favor in this case on substantially the same evidence and while on the former appeal we held the verdict and judgment in plaintiff's favor were against the manifest weight of the evidence, yet we are of opinion, bearing in mind that two juries have passed on the question in plaintiff's favor, we would not be warranted in again holding that the verdict was against the manifest weight of the evidence. Rothschild v. Sabath, #39837, opinion filed October 31, 1938; Norkevich v.

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There have been two verdicts in plaintiff's favor in this case on substantially the same evidence and while on the former appeal we held the verdict and judgment in plaintiff's favor were against the manifest weight of the evidence, yet we are of opinion, bearing in mind that two juries have passed on the question in plaintiff's favor, we would not be warranted in again holding that the verdict was against the manifest weight of the evidence. Hofmann v. Gebelt, #39827, opinion filed October 31, 1938; Norkevich v.

Atchison T. & S.F. Ry. Co., 263 Ill. App. 1; Egbers v. Egbers, 177 Ill. 82.

In the Norkevich case it was said that the Appellate Courts of this state have reversed judgments on the ground that "the verdict was against the manifest weight of the evidence but upon a subsequent appeal have refused to reverse the judgment upon that ground, for the reason that where there have been two or more verdicts in a case for the same party and there is any evidence to sustain the judgment appealed from, appellate courts are very reluctant to disturb it." While we have the power and the right to set aside a second or third verdict if we think they should not stand, (Ill. Cent. R.R. v. Patterson, 93 Ill. 290; Stanberry v. Moore, 56 Ill. 472) we think we would not be warranted to do so under the facts as disclosed by the record in the instant case.

Plaintiff further contends that she is entitled to judgment in this court upon the verdict since there were no substantial procedural errors on the trial. No procedural errors are argued in the briefs. The question then is, on the face of the record, is plaintiff entitled to judgment on the verdict. We hold that she is. Par. 3c, sec. 68, Ill. Rev. Stats. 1937; Hill v. Richardson, 281 Ill. App. 75; #40267 Denny v. Goldblatt Bros. Inc., (opinion filed this date.).

The judgment of the Municipal Court of Chicago is reversed and judgment will be entered in this court in plaintiff's favor and against defendant for \$2,150.

JUDGMENT REVERSED AND JUDGMENT ENTERED IN THIS COURT.

McSurely, P.J. concurs.

Matchett, J., specially concurring.

I concur in this judgment only because the brief of defendant in this court, as it seems to me, waives any error of the trial court in failing to grant defendant's motion for a new trial.

Atkinson v. S.F. Ry. Co., 263 Ill. App. 1; Ebers v. Ebers,

177 Ill. 82.

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Courts of this state have reversed judgments on the ground that

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reluctant to disturb it." While we have the power and the right

to set aside a second or third verdict if we think they should not

stand, (Ill. Ct. R. v. Peterson, 93 Ill. 290; Stender v.

Moore, 56 Ill. 472) we think we would not be warranted to do so

under the facts as disclosed by the record in the instant case.

Plaintiff further contends that she is entitled to judgment

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is. Per. 3c, sec. 68, Ill. Rev. Stat. 1937; Hill v. Richardson,

281 Ill. App. 75; 40287 D and v. Goldblatt Bros. Inc., (opinion

filed this date.)

The judgment of the Municipal Court of Chicago is reversed

and judgment will be entered in this court in plaintiff's favor

and against defendant for \$2,150.

JUDGMENT REVERSED AND JUDGMENT ENTERED IN THIS COURT.

McGuire, P.J. concurs.

Macchett, J., specially concurring.

I concur in this judgment only because the brief of defendant in this court, as it seems to me, contains any error of the trial court in failing to grant defendant's motion for a new trial.

40291

In the Matter of the
ESTATE OF JOSEPH J. REITER,
Deceased.

MARGARET SCHAAACK,
Appellee,

vs.

MARIE A. REITER and AGNES A.
REITER, Administratrices of the
Estate of JOSEPH J. REITER,
Deceased,
Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

298 I.A. 623⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Margaret Schaaack filed her claim in the Probate Court of Cook County in the matter of the estate of Joseph J. Reiter, deceased. The claim as filed was for \$12,000 for "money loaned as per copy of receipt" attached, with interest at 6% from March 27, 1936 to September 27, 1936, \$360, making a total of \$12,360. The receipt was on a blank printed form used by Joseph J. Reiter and is as follows: "Chicago, Ill., March 18, 1930. RECEIVED OF Margaret Schaaack Thirteen Thousand Dollars for purchase of First Mortgage on property in Chicago, Ill. Chicago, Cook County, Illinois. This receipt must be surrendered when said papers are delivered. \$13,000, Joseph J. Reiter." The words underscored were printed, the balance written in the blank spaces. The claim was allowed March 12, 1937 as of the 6th class. November 20, 1937, Mrs. Schaaack filed her verified petition in the Probate Court setting up the filing and allowance of her claim for \$12,690 as of the 6th class; that she was not represented by an attorney at that time and was not advised "as to her possible rights as a claimant against" the estate; that

40201

In the Matter of the
ESTATE OF JOSEPH J. REITER,
Deceased.

MARGARET SCHASACK,
Appellee,

vs.

MARIE A. REITER and AGNES A.
REITER, Administrators of the
Estate of JOSEPH J. REITER,
Deceased,
Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

2981.A.628

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Margaret Schasack filed her claim in the Probate Court of Cook County in the matter of the estate of Joseph J. Reiter, deceased. The claim as filed was for \$12,000 for "money loaned as per copy of receipt" attached, with interest at 6% from March 27, 1936 to September 27, 1936, \$360, making a total of \$12,360. The receipt was on a blank printed form used by Joseph J. Reiter and is as follows: "Chicago, Ill., March 18, 1930. RECEIVED OF Margaret Schasack Thirteen Thousand Dollars for purchase of First Mortgage on property in Chicago, Ill. Chicago, Cook County, Illinois. This receipt must be surrendered when said papers are delivered. \$12,000. Joseph J. Reiter." The words underscored were printed, the balance written in the blank spaces. The claim was allowed March 12, 1937 as of the 6th class. November 20, 1937, Mrs. Schasack filed her verified petition in the Probate Court setting up the filing and allowance of her claim for \$12,690 as of the 6th class; that she was not represented by an attorney at that time and was not advised "as to her possible rights as a claimant against" the estate; that

the indebtedness due to her arose out of a transaction in which she turned over moneys to the deceased for the purpose of having him purchase first mortgages on Chicago property for her, as shown by a receipt which Reiter gave to her. (The receipt is the one above quoted.) The petitioner further alleged that her claim should be allowed as of the 5th class and the prayer was that it be allowed as such.

A few days afterward claimant filed an amended verified petition making the same allegations in substance as in her original petition and in addition she averred that at the time she signed her proof of claim the attorney for the estate advised her that there was more than enough money in the estate to pay all claims and that her claim would be paid in full; that claimant and her family were very close friends of the deceased and his family and that afterward representatives of the estate advised her that her claim would be paid in full; that she knew nothing about the classification of claims and prayed that the claim be re-classified as of the 5th class. A few days later, Agnes A. Reiter, widow of the deceased, and Marie Reiter, their daughter, who were appointed to administer the estate, filed their verified answer averring that the claim having been allowed March 12, 1937, as of the 6th class, and since there was no allegation in Mrs. Schaack's petition of any facts showing fraud or mistake in the allowance of the claim, the court had no jurisdiction to re-classify it; that the money was not held by the estate in trust within the meaning of par. 71, chap. 3, Ill. Rev. Stats. 1937. They denied that claimant had not been advised of her rights but averred that she consulted the attorney representing the estate and was advised by him that the claim could not be allowed, except as a general claim, and denied that they told her the claim would be paid in full. They further averred that Mrs. Schaack had been a customer of the deceased for more than 20 years during which time he operated a real estate and mortgage business and

the indebtedness due to her arose out of a transaction in which she turned over money to the deceased for the purpose of having him purchase first mortgages on Chicago property for her, as shown by a receipt which Reiter gave to her. (The receipt is the one above quoted.) The petitioner further alleged that her claim should be allowed as of the 5th class and the prayer was that it be allowed as such.

A few days afterward claimant filed an amended verified petition making the same allegations in substance as in her original petition and in addition she averred that at the time she signed her proof of claim the attorney for the estate advised her that there was more than enough money in the estate to pay all claims and that her claim would be paid in full; that claimant and her family were very close friends of the deceased and his family and that afterward representatives of the estate advised her that her claim would be paid in full; that she knew nothing about the classification of claims and prayed that the claim be re-classified as of the 5th class. A few days later, Agnes A. Reiter, widow of the deceased, and Marie Reiter, their daughter, who were appointed to administer the estate, filed their verified answer averring that the claim having been allowed March 12, 1937, as of the 5th class, and since there was no allegation in Mrs. Schaeck's petition of any facts showing fraud or mistake in the allowance of the claim, the court had no jurisdiction to re-classify it; that the money was not held by the estate in trust within the meaning of par. 71, chap. 3, Ill. Rev. Stats. 1937. They denied that claimant had not been advised of her rights but averred that she consulted the attorney representing the estate and was advised by him that the claim could not be allowed, except as a general claim, and denied that they told her the claim would be paid in full. They further averred that Mrs. Schaeck had been a customer of the deceased for more than 20 years during which time he operated a real estate and mortgage business and

invested Mrs. Schaack's funds in mortgages as requested, collected interest and principal, etc., turning over the money to her; that he had paid Mrs. Schaack \$1,000 December 14, 1931, leaving a balance of \$12,000 due; that he paid interest semi-annually on the \$12,000 to Mrs. Schaack, the last payment being made March 27, 1936. They further averred that the money remained in the possession of deceased from March 18, 1930, until the time of his death, August 7, 1936, with the knowledge and consent of Mrs. Schaack; that she knew the money was being used by Reiter in the operation of his business, and that the relation was that of debtor and creditor; that there were claims against the estate aggregating \$289,000 "who are in the same class" as Mrs. Schaack, and that the cash and personal property assets of the estate are estimated at \$85,000.

December 8, 1937, the Probate Court heard the matter, reclassified the claim and it was allowed as of the 5th class. An appeal was taken to the Circuit Court of Cook County, and after hearing, an order was entered allowing the claim as of the 5th class. This appeal followed.

The record discloses that Joseph J. Reiter, for many years, was engaged in business at 1543 West 51st street, Chicago, dealing in real estate mortgages and fire insurance; that Mrs. Schaack and her husband conducted a butcher shop for many years which was located not far from Reiter's place of business. The families lived in the neighborhood and were friendly in a social and business way for about 20 years. Reiter had been doing business for the Schaacks such as selling them some mortgages, fire insurance, etc. Mr. Schaack died and some time afterward the claimant, his widow, moved to Evanston. Joseph B. Hermes was raised in the neighborhood where the parties did business and was afterward admitted to the bar and practiced in Chicago. Later he was elected a judge of the Municipal Court of Chicago. He was favorably known to both the Reiters and

invested Mrs. Schasack's funds in mortgages as requested, collected interest and principal, etc., turning over the money to her; that he had paid Mrs. Schasack \$1,000 December 14, 1931, leaving a balance of \$12,000 due; that he paid interest semi-annually on the \$12,000 to Mrs. Schasack, the last payment being made March 27, 1936. They further averred that the money remained in the possession of deceased from March 18, 1930, until the time of his death, August 7, 1936, with the knowledge and consent of Mrs. Schasack; that she knew the money was being used by Reiter in the operation of his business, and that the relation was that of debtor and creditor; that there were claims against the estate aggregating \$239,000 "who are in the same class" as Mrs. Schasack, and that the cash and personal property assets of the estate are estimated at \$85,000. December 8, 1937, the Probate Court heard the matter, re-classified the claim and it was allowed as of the 5th class. An appeal was taken to the Circuit Court of Cook County, and after hearing, an order was entered allowing the claim as of the 5th class. This appeal followed. The record discloses that Joseph L. Reiter, for many years, was engaged in business at 1543 West 61st Street, Chicago, dealing in real estate mortgages and life insurance; that Mrs. Schasack and her husband conducted a butcher shop for many years which was located not far from Reiter's place of business. The families lived in the neighborhood and were friendly in a social and business way for about 20 years. Reiter had been doing business for the Schasacks such as selling them some mortgages, life insurance, etc. Mr. Schasack died and some time afterward the claimant, his widow, moved to Evanston. Joseph B. Korman was raised in the neighborhood where the parties did business and was afterward admitted to the bar and practiced in Chicago. Later he was elected a Judge of the Municipal Court of Chicago. He was favorably known to both the Reiters and

the Schaacks. At the time Reiter died he had \$3,000 on deposit in the bank. He carried life insurance payable to his estate of more than \$90,000; he owned real estate on which there were mortgages executed by him.

Counsel for Mrs. Schaack, in stating the facts, in their brief say, "Prior to March 26, 1927, the decedent purchased two mortgages for the plaintiff and continued thereafter to service those and other mortgages for her, as well as handle all of her insurance matters. On or about March 26, 1927, the plaintiff sold property owned by her on Park Place and turned the proceeds of \$26,366.81 over to the decedent to purchase first mortgages for the plaintiff. On September 27, 1927, the decedent had in his hands \$15,000 belonging to the plaintiff. He issued to plaintiff a trust receipt for that amount which was in the same form as *** (the receipt above quoted). On March 18, 1930, he still had \$13,000 of her money and on that date she turned in her trust receipt for \$15,000, receiving in exchange a trust receipt for \$13,000. On December 14, 1931 the decedent paid out \$1,000 for the account of the plaintiff, thereby reducing the amount of the plaintiff's money in his hands to \$12,000." We shall assume the facts as stated by counsel are substantially correct. The evidence further shows that from March 26, 1927 until March 27, 1936, Reiter paid Mrs. Schaack 6% interest every six months on the amount remaining in his hands. As stated, it was originally \$26,366.81 but by the following year it was reduced to \$15,000, the reduction apparently resulting from mortgages purchased by Reiter for Mrs. Schaack and for money paid to her, although this does not clearly appear from the evidence. From March 1928 until March 27, 1929 Reiter paid 6% interest on the \$15,000 semi-annually to Mrs. Schaack and from March 27, 1930 he paid her 6% semi-annually on the remaining \$13,000 until it was reduced to \$12,000 March 1932, and from that

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date he paid her the same rate semi-annually on the remaining \$12,000 to March 27, 1936.

There is no evidence that during that time Reiter ever purchased for Mrs. Schaack any bonds or mortgages or that she asked him whether he had done so. It is clear she was satisfied to trust Reiter as she was receiving 6% interest on the amount still due her from him. It was only after Reiter died, and several months after her claim was filed in the Probate Court and allowed, and after she learned that her claim probably would not be paid in full, that she made any complaint.

While there are apparently some inconsistencies in the opinions of the courts in this State, we think it clear that the money remaining due from the deceased to Mrs. Schaack which he had received from her, was not money received "in trust for any purpose" within the meaning of paragraph 5, section 71, chapter 3, Ill. Rev. Stats. 1937. Wilson v. Kirby, 88 Ill. 566; Svanoe v. Jurgens, 144 Ill. 507; Felsenthal v. Kline, 214 Ill. 121; Jarrett v. Johnson, 216 Ill. 212; Merchants' Loan & Trust Co. v. Hulette, 187 Ill. App. 161.

In the Felsenthal case, (214 Ill. 121) it appears that at the time Felsenthal died he had a personal account in one bank, and an account in another bank in his name as trustee. The latter account was made up of items which deceased had received from certain customers for whom he acted as broker or loan agent. Claims against this account were allowed as of the 7th class (now 6th class) and ordered to be paid in due course of administration. It was contended that the claim was of the 6th class. The court there said, (p. 123): "Section 70 of chapter 3 of Hurd's Statutes of 1903 provides for the classification of claims against the estates of deceased persons. The sixth ^{clause} (now 5th) provides, 'where the deceased

date he paid her the same rate semi-annually on the remaining \$12,000 to March 27, 1936.

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While there are apparently some inconsistencies in the opinions of the courts in this State, we think it clear that the money remaining due from the deceased Mrs. Schack which he had received from her, was not money received "in trust for any purpose" within the meaning of paragraph 5, section 71, chapter 3, Ill. Rev. Stat. 1937. Wilson v. Kirby, 88 Ill. 586; Evans v. Burgess, 144 Ill. 507; Felsenthal v. Kirby, 314 Ill. 181; Tarrett v. Johnson, 316 Ill. 312; Morgan's Loan Trust Co. v. Klette, 187 Ill. App. 141.

In the Felsenthal case (314 Ill. 181) it appears that at the time Felsenthal died he had a personal account in one bank, and an account in another bank in his name as trustee. The latter account was made up of items which deceased had received from certain others for whom he acted as broker or loan agent. Claims against this account were allowed as of the 7th class (now 6th class) and ordered to be paid in the course of administration. It was contended that the claim was of the 6th class. The court there said (p. 123): "Section 70 of chapter 3 of Hurd's Statutes of 1903 provides for the classification of claims against the estates of deceased persons. The sixth (now 5th) provides, 'where the deceased

has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for.' Such claims are designated as of the sixth [5th] class. By the seventh clause [6th] debts and demands of every kind and character not included in the other six classes are to be allowed as of the seventh [6th] class. We have uniformly held that the word 'trust', ^{as} used in the sixth clause is not to be taken in its general sense as embracing every case in which a confidence has been reposed, but must be understood in the restrictive sense, and applies only to technical trusts, having no application to trusts which the law implies as growing out of contracts. (Wilson v. Kirby, 88 Ill. 566; Svance v. Jurgens, 144 id. 507; Shipherd v. Furness, 153 id. 590.) There is no construction of the facts in this case which can bring it within the definition of a trust as defined by these decisions, and the courts below have each properly placed it in the seventh [6th] class." But counsel for Mrs. Schaack say that the receipt given to her by Reiter shows on its face that the money was held in trust; that by the receipt Reiter acknowledged he had been given \$13,000 by Mrs. Schaack with which to purchase first mortgages on Chicago real estate for her and that the receipt was to be surrendered to Reiter "when said papers are delivered". But we think the course of dealing between the parties must be looked upon as a whole and not limited to the receipt of March 18, 1930 to determine the relations between the parties.

In support of their contention that the money was held in trust by Reiter, counsel cite, People v. Bates, 351 Ill. 439; In re Estate of Melone, 247 Ill. App. 226, and other cases.

has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for.' Such claims are designated as of the sixth [5th] class. By the seventh clause [6th] debts and demands of every kind and character not included in the other six classes are to be allowed as of the seventh [6th] class. We have uniformly held that the word 'trust', ^{as} used in the sixth clause is not to be taken in its general sense as embracing every case in which a confidence has been reposed, but must be understood in the restrictive sense, and applies only to technical trusts, having no application to trusts which the law implies as growing out of contracts. (Wilson v. Kirby, 88 Ill. 566; Stanco v. Jenkins, 144 Ill. 507; Engelhard v. Friesess, 153 Ill. 590.) There is no construction of the facts in this case which can bring it within the definition of a trust as defined by these decisions, and the courts below have each properly placed it in the seventh [6th] class." But counsel for Mrs. Schaeck say that the receipt given to her by Reiter shows on its face that the money was held in trust; that by the receipt Reiter acknowledged he had been given \$13,000 by Mrs. Schaeck with which to purchase first mortgages on Chicago real estate for her and that the receipt was to be surrendered to Reiter "when said papers are delivered". But we think the course of dealing between the parties must be looked upon as a whole and not limited to the receipt of March 18, 1930 to determine the relations between the parties.

In support of their contention that the money was held in trust by Reiter, counsel cite, People v. Bates, 351 Ill. 439; In re Estate of Malone, 247 Ill. App. 326, and other cases.

In the Bates case a receiver was appointed by the auditor of a bank and his appointment was confirmed by the court. Mrs. Bates filed her petition in the receivership proceedings to give her a preference over the general creditors. The chancellor allowed the preference. This was reversed on appeal, by the Appellate Court holding that she was a general creditor and should pro-rate with such other creditors. The Supreme Court allowed certiorari and reversed the Appellate Court holding that Mrs. Bates was entitled to a preferred claim. The evidence in that case was that Mrs. Bates had received as her share of an estate, being probated in New York, a note secured by a mortgage on New York real estate. She lived in Illinois and for many years had transacted her business with the bank, which was located in this state. She received the note and mortgage through the Illinois bank where they remained until April, 1929, when the note was collected by the bank, a draft being sent for it by a New York bank. The Illinois bank sent it to the Chemical National Bank of New York City, its correspondent, for deposit to the Illinois bank's credit, which was done without the knowledge or consent of Mrs. Bates. When the note was collected by the Illinois bank it notified Mrs. Bates and she called on the banker. He told her he would put it out on farm mortgages "and I left the money at the bank"; that he would notify her when he got the papers ready. Some time after the banker collected the money he gave Mrs. Bates a receipt for it which recited that the money was "To be invested in mortgage loans". The court in deciding whether the money was held in trust by the bank said: (p.442) "In People v. Farmers State Bank, 338 Ill. 134, we said: 'There are but two kinds of deposits: special and general. The former include those where the bank becomes a trustee for a depositor by special agreement or under circumstances sufficient to create a trust, and general deposits are those where the bank merely becomes the debtor of the depositor.' In this case the money was

In the Bates case a receiver was appointed by the auditor of a bank and his appointment was confirmed by the court. Bates filed her petition in the receivership proceedings to give her a preference over the general creditors. The chancellor allowed the preference. This was reversed on appeal, by the Appellate Court holding that she was a general creditor and should pro-rate with such other creditors. The Supreme Court allowed certiorari and reversed the Appellate Court holding that Mrs. Bates was entitled to a preferred claim. The evidence in that case was that Mrs. Bates had received as her share of an estate, being probated in New York, a note secured by a mortgage on New York real estate. She lived in Illinois and for many years had transacted her business with the bank, which was located in this state. She received the note and mortgage through the Illinois bank where they remained until April, 1923, when the note was collected by the bank, a draft being sent for it by a New York bank. The Illinois bank sent it to the Chemical National Bank of New York City, its correspondent, for deposit to the Illinois bank's credit, which was done without the knowledge or consent of Mrs. Bates. When the note was collected by the Illinois bank it notified Mrs. Bates and she called on the banker. He told her he would put it out on farm mortgages "and I left the money at the bank"; that he would notify her when he got the papers ready. Some time after the banker collected the money he gave Mrs. Bates a receipt for it which stated that the money was "to be invested in mortgage loans". The court in deciding whether the money was held in trust by the bank said: (p.442) "In People v. Farmers State Bank, 338 Ill. 134, we said: 'There are but two kinds of deposits: special and general. The former include those where the bank becomes a trustee for a depositor by special agreement or under circumstances sufficient to create a trust, and general deposits are those where the bank merely becomes the debtor of the depositor.'"

not left at the bank to be credited to the general account of Mrs. Bates or as a time deposit. It was not subject to check and the bank had no right to mingle it with other funds. The receipt given to Mrs. Bates specifies the purpose for which the money was left and conclusively impresses it with a trust. No change in the status or form of the trust fund could without her consent divest it of the trust. *** She is not compelled to look to the amount on deposit in the Chemical National Bank to the credit of the Schuyler Bank for reimbursement." In the Bates case it will be noted that par. 5 of sec. 71 of the Administration Act, which is the pertinent statute in the instant case, was in no way involved or considered. The court there was passing on the two different kinds of deposits in a bank. There was no course of dealing between the banker in that case, and Mrs. Bates by which she might be informed that the banker was without authority, using her money for his own purpose, while in the instant case the undisputed evidence is that Mrs. Schaack was, from time to time, paid part of the \$26,366.81 and was also paid 6% interest semi-annually on the balances remaining due to her, and this extended over a period from March, 1927 until March, 1936, about nine years. During all that time there is no evidence she ever inquired about the purchase of any mortgages by Reiter for her.

In the Melone case (247 Ill. App. 226) it appeared that Melone conducted a so-called private banking business in a grocery store in Chicago. He also accepted money for deposit giving a form of deposit book showing entries and withdrawals. He died in 1925 and a claim was filed against his estate claiming it to be a trust fund, and that it should be allowed as of the 5th class mentioned in the statute. About a year before Melone died, the claimant had on deposit with him \$2,300 which he withdrew. Melone asked him what he was going to do with the money and was told

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on deposit in the Chemical National Bank to the credit of the beneficiary Bank for reimbursement." In the Bates case it will be noted that part 5 of sec. 71 of the Administration Act, which is the pertinent statute in the instant case, was in no way involved or considered. The court there was passing on the two different kinds of deposits in a bank. There was no course of dealing between the banker in that case, and Mrs. Bates by which she might be informed that the banker was without authority, using her money for his own purpose, while in the instant case the undisputed evidence is that Mrs. Schenck was, from time to time, paid part of the \$26,366.81 and was also paid 6% interest semi-annually on the balances remaining due to her, and this extended over a period from March, 1927 until March, 1936, about nine years. During all that time there is no evidence she ever inquired about the purchase of any mortgages by Reiter for her.

In the Melone case (247 Ill. App. 236) it appeared that Melone conducted a so-called private banking business in a grocery store in Chicago. He also accepted money for deposit giving a form of deposit book showing entries and withdrawals. He died in 1925 and a claim was filed against his estate claiming it to be a trust fund, and that it should be allowed as of the 5th class mentioned in the statute. About a year before Melone died, the claimant had on deposit with him \$2,300 which he withdrew. Melone asked him what he was going to do with the money and was told

claimant was going to send it to Italy. Melone said he could transmit the money and it was given to him for that purpose - to buy a certain number of lire. Melone then gave claimant a receipt "which on its face contained the amount of the lire received - namely 55,000" etc. Melone used the money for his own purpose and the court said, (p. 230): "The money in the hands of the deceased was converted and embezzled by him, and immediately a situation arose which created a trust fund in his hands for the benefit of Grieco" (the claimant). And it was held that the claim should be allowed as of the 5th class. It was there contended the money was not held in trust as mentioned in the act, but the court held this untenable and said, (p. 231): "Trusts in the law are resulting or constructive trusts, express or implied trusts, and we are unfamiliar with the so-called 'technical trusts' except as we learn of them in the decisions of this State where it is attempted to create a technical trust for the purpose of distinguishing the statute in regard to the administration of estates."

We think the facts in that case are not similar to the facts in the case at bar. There the money was given by the claimant to Melone for the purpose of purchasing a number of lire so that it could be sent to Italy, but instead of doing this, Melone converted and embezzled the money to his own use. There was no course of dealing in that case between the parties as there was between the parties in the instant case.

We think the claim should have been allowed as one of the 6th class. The court was without power to re-classify the claim by virtue of a petition filed several months afterward, viz., November 20, 1937. Ford v. First National Bank, 201 Ill. 120; Tisdale v. Davis, 198 Ill. App. 116; Gulzow v. Fillwock, 205 Ill. App. 366; Austin v. City Bank of Milwaukee, 288 Ill. App. 36.

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mit the money and it was given to him for that purpose - to pay
a certain number of lire. Melone then gave claimant a receipt
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namely 25,000" etc. Melone used the money for his own purpose and
the court said, (p. 230): "The money in the hands of the deceased
was converted and embarked by him, and immediately a situation
arose which created a trust fund in his hands for the benefit of
Grieco" [the claimant]. And it was held that the claim should
be allowed as of the 8th class. It was there contained the money
was not held in trust as mentioned in the act, but the court held
this untenable and said, (p. 231): "Trusts in the law are resulting
or constructive trusts, express or implied trusts, and we are un-
familiar with the so-called 'technical trusts' except as we learn
of them in the decisions of this State where it is attempted to
create a technical trust for the purpose of distinguishing the estate
in regard to the administration of estates."

We think the instant case is not similar to the
facts in the case at bar. There the money was given by the claimant
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Tisdale v. Davis, 198 Ill. App. 115; Gulrow v. Willwood, 208 Ill.
App. 366; Anstis v. City Bank of Milwaukee, 238 Ill. App. 36.

In the Ford case, our Supreme Court held that where a claim has been allowed as of a certain class, such classification could not be set aside at a subsequent term in the absence of fraud, accident or mistake, and counsel for both sides seem to agree that this is the law. But counsel for Mrs. Schaack say she has proven by clear and convincing evidence that she was imposed upon by Judge Hermes and later by attorney Ricker, who represents the estate in this case, as well as the representatives of the estate being members of the family of Joseph J. Reiter, deceased. In support of this, counsel say that shortly after the death of Reiter, plaintiff called upon the representative of the estate, Judge Hermes, and attorney Ricker, and was informed her claim would be paid in full and that they failed to inform her of the different classes of claims against the estate that the statute authorizes. And Mrs. Schaack gave testimony to this effect. But we think it clear that the claim of any fraud, accident or mistake is wholly unwarranted. The evidence shows that after the death of Reiter, the members of his family advised Mrs. Schaack they intended to carry on the business and it was suggested that she call on Judge Hermes, who would attend to her matter without any expense, and later the matter was handled by attorney Ricker. We think it clear that no one thought about the classification of the claim until some time afterward when Mrs. Schaack saw her claim would not be paid in full. And our opinion would be the same if we consider the evidence offered on behalf of Mrs. Schaack to the effect that Judge Hermes had a claim of the 6th class against the estate which was offered but erroneously excluded.

The judgment of the Circuit Court of Cook County is reversed and the matter remanded with directions to allow the claim as of the 6th class.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

In the Ford case, our Supreme Court held that where a claim has been allowed as of a certain class, such classification could not be set aside at a subsequent term in the absence of fraud, accident or mistake, and counsel for both sides seem to agree that this is the law. But counsel for Mrs. Schack says she has proven by clear and convincing evidence that she was imposed upon by Judge Hermes and later by attorney Ricker, who represents the estate in this case, as well as the representatives of the estate being members of the family of Joseph J. Reiter, deceased. In support of this, counsel say that shortly after the death of Reiter, plaintiff called upon the representative of the estate, Judge Hermes, and attorney Ricker, and was informed her claim would be paid in full and that they failed to inform her of the different classes of claims against the estate that the statute authorized. And Mrs. Schack gave testimony to this effect. But we think it clear that the claim of any fraud, accident or mistake is wholly unwarranted. The evidence shows that after the death of Reiter, the members of his family advised Mrs. Schack they intended to carry on the business and it was suggested that she call on Judge Hermes, who would attend to her matter without any expense, and later the matter was handled by attorney Ricker. We think it clear that no one thought about the classification of the claim until some time afterward when Mrs. Schack saw her claim would not be paid in full. And our opinion could be the same if we consider the evidence offered on behalf of Mrs. Schack to the effect that Judge Hermes had a claim of the 6th class against the estate which was offered but erroneously excluded.

The judgment of the Circuit Court of Cook County is reversed and the matter remanded with directions to allow the claim as of the 6th class.

REVERSED AND REMANDED WITH DIRECTIONS.

McGuire, P. J., and Metchett, J., concur.

40388

HARRY A. BIGELOW, as Trustee in
Bankruptcy of Insull Utility
Investments, Inc.,

Appellant,

vs.

SAMUEL N. BECKER and JULIA A.
BECKER,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

298 I.A. 624'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover \$1785 with interest thereon at 5% per annum from June 15, 1931. Defendants' motion to strike the complaint was sustained, the suit dismissed and plaintiff appeals.

It was alleged in the complaint that Insull Utility Investments, Inc., was adjudged a bankrupt by the United States District Court for this District on September 22, 1932, and plaintiff was appointed and qualified as trustee of the estate; that among the assets of the bankrupt estate were certain written contracts known as subscription warrants signed by defendants, whereby they subscribed for 51 shares of the common stock of an increase of stock of the Investments Company, as authorized by resolution of the Board of Directors on July 28, 1930, for which they agreed to pay \$2,550 in 10 installments of \$255 each on or before the 15th day of each month beginning with September, 1930, and ending with the month of June, 1931; that defendants paid on account \$255 September 12, and \$510 November 8, 1930, leaving a balance of \$1785. A copy of the resolution of the Board of Directors and "Subscription Warrants" were attached to the complaint and made a part thereof. It was further alleged that if the assets

40388

HARRY A. BIRLOTT, as Trustee in
Bankruptcy of Inland Utility
Investments, Inc.,

Appellant,

vs.

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BROKER,

Appellees.

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298 I.A. 624

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Investments, Inc., was adjudged a bankrupt by the United States

District Court for this District on September 22, 1930, and

plaintiff was appointed and qualified as trustee of the estate; that

among the assets of the bankrupt estate were certain written con-

tracts known as subscription warrants signed by defendants, whereby

they subscribed for 51 shares of the common stock of an insurance

of stock of the Investments Company, as authorized by resolution

of the Board of Directors on July 23, 1929, for which they agreed

to pay \$2.50 in 10 installments of \$255 each on or before the

15th day of each month beginning with September, 1930, and ending

with the month of June, 1931; that defendants paid on account

\$255 September 12, and \$210 November 8, 1930, leaving a balance

of \$1785. A copy of the resolution of the Board of Directors

and "Subscription Warrants" were attached to the complaint and

made a part thereof. It was further alleged that if the assets

of the bankrupt estate were collected in full, including all unpaid subscriptions for the stock, the money would be insufficient to pay all valid claims filed against the estate.

December 21, 1938, we filed an opinion in the case of Bigelow, Trustee in Bankruptcy of Insull Utility Investments, Inc., v. Bicek, #40219, which was an appeal from a judgment of the Circuit Court of Cook County, where the allegations of the complaint were substantially the same as those in the instant case. In that case the complaint was stricken for insufficiency and we affirmed the judgment.

In a petition for a rehearing filed by counsel for plaintiff in that case, counsel say that the case is identical with the case at bar and the same argument is made and the same authorities cited in the two cases, plaintiff being represented by the same counsel in each case. At the request of plaintiff's counsel we did not pass upon the petition for a rehearing in the Bicek case until we heard the oral argument and considered the briefs in the instant case and we have again reached the conclusion that the complaint was insufficient and the court did not err in striking it. And for the reasons stated in the opinion filed in the Bicek case, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

McSurely, P.J., and Matchett, J., concur.

of the bankrupt estate were collected in full, including all unpaid subscriptions for the stock, the money would be insufficient to pay all valid claims filed against the estate.

December 21, 1938, we filed an opinion in the case of Ricklow, Trustee in Bankruptcy of Inland Utility Investments, Inc. v. Rick, 440219, which was an appeal from a judgment of the Circuit Court of Cook County, where the allegations of the complaint were substantially the same as those in the instant case. In that case the complaint was stricken for immateriality and we affirmed the judgment.

In a petition for a rehearing filed by counsel for plaintiff in that case, counsel say that the case is identical with the case at bar and the same argument is made and the same authorities cited in the two cases, plaintiff being represented by the same counsel in each case. At the request of plaintiff's counsel we did not pass upon the petition for a rehearing in the Rick case until we heard the oral argument and considered the briefs in the instant case and we have again reached the conclusion that the complaint was immaterial and the court did not err in striking it. And for the reasons stated in the opinion filed in the Rick case, the judgment of the Superior Court of Cook County is affirmed.

JUDGE AT BARR.

McGarry, P.J., and McRobert, J., concur.

39571

EDWARD HINES LUMBER CO., a
corporation, CARNEY CONSTRUCTION
CO., a corporation, and CHAS. C.
BREYER CO., a corporation,
Appellees,

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

JOHN L. MANTA,

Appellant.

298 I.A. 624

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On August 29, 1934, plaintiffs filed a complaint in the Superior court of Cook ~~xxxxxx~~ county averring that they sold and delivered certain goods, wares and merchandise and furnished work, labor and materials to Greek Exhibits, Inc., a corporation, as set out in statements of account attached thereto and marked Exhibits "A", "B" and "C"; that to induce plaintiffs to sell the merchandise and furnish the work, labor and materials defendants John L. Manta and John D. Dritsas, well knowing the true facts, falsely and fraudulently represented to plaintiffs and each of them that Greek Exhibits, Inc., at the Century of Progress "was a project of the Republic of Greece and that the Republic of Greece was definitely associated with and financially interested in the Greek Exhibits, Inc., a corporation, and that moneys would be furnished by the Republic of Greece with which to pay the financial obligations of the Greek Exhibits, Inc., a corporation. 3. That the plaintiffs, and each of them, relying upon the representations of the defendants as aforesaid, and believing said representations to be true and in reliance upon the faith and credit of the Republic of Greece, sold and delivered the goods, wares and merchandise, and furnished the work, labor and materials as hereinabove set out in

Exhibits 'A', 'B' and 'C'. 4. That the representations of the defendants hereinabove set out were false and fraudulent in that the Republic of Greece at no time was associated with or had any interest, financial or otherwise, in the Greek Exhibits, Inc., at a Century of Progress, and that the defendants and each of them were and are financially interested in the Greek Exhibits, Inc., a corporation, and made the false and fraudulent representations aforesaid with the knowledge that said representations were untrue for the purpose of inducing the plaintiffs and each of them to extend credit to the Greek Exhibits, Inc., a corporation. 5. That the Greek Exhibits, Inc., a corporation, has not paid for the goods, wares and merchandise or work, labor or materials furnished and sold by the plaintiffs or any part thereof, and is now insolvent. 6. That by reason of the false and fraudulent representations of the defendants they have suffered damages as follows: Edward Hines Lumber Co., a corporation, \$729.82; Carney Construction Co., a corporation, \$1,488.83; Chas. C. Breyer Co., a corporation, \$1,254." Exhibit A contained an itemized statement of the account of plaintiff Edward Hines Lumber Co., the first invoice dated May 23, 1934, and the last invoice dated June 22, 1934, and totaling \$729.82; Exhibit B, an itemized statement of the account of plaintiff Carney Construction Co., dated June 19, 1934, showing a total sum of \$3,988.83 and a payment by cash of \$2,500, leaving a balance of \$1,488.83; and Exhibit C, an itemized statement of the account of plaintiff Chas. C. Breyer Co., dated June 25, 1934, showing debits of \$2,454 and credits of \$1,200, with a balance due of \$1,254. The answer of defendant Manta denies that he requested plaintiffs to sell and deliver the merchandise or to furnish the work, labor or material to the corporation; denies that the merchandise sold or the work, labor or material furnished to the corporation was at his special

Exhibits 'A', 'B' and 'C'. A. That the representations of the defendants hereinabove set out were false and fraudulent in that the Republic of Greece at no time was associated with or had any interest, financial or otherwise, in the Greek Exhibits, Inc., at a company of progress, and that the defendants and each of them were and are financially interested in the Greek Exhibits, Inc., a corporation, and made the false and fraudulent representations aforesaid with the knowledge that said representations were untrue for the purpose of inducing the plaintiffs and each of them to extend credit to the Greek Exhibits, Inc., a corporation. B. That the Greek Exhibits, Inc., a corporation, has not paid for the goods, wares and merchandise or work, labor or material furnished and sold by the plaintiffs or any part thereof, and is now insolvent. C. That by reason of the false and fraudulent representations of the defendants they have suffered damages as follows: \$40,000 from Lumber Co., a corporation; \$750,824; Carney Construction Co., a corporation; \$1,488,834; Chas. C. Fryer Co., a corporation; \$1,884,834. Exhibit A contained an itemized statement of the account of plaintiff Chas. C. Fryer Co., the first invoice dated July 1, 1934, and the last invoice dated June 28, 1934, and totaling \$750,824. Exhibit B, an itemized statement of the account of plaintiff Carney Construction Co., dated June 1, 1934, showing a total sum of \$3,988,834 and a payment by cash of \$2,500, leaving a balance of \$1,488,834; and Exhibit C, an itemized statement of the account of plaintiff Chas. C. Fryer Co., dated June 28, 1934, showing a balance of \$1,884,834 and credits of \$1,000, with a balance due of \$1,884,834. The answer of defendants states that they requested plaintiffs to sell and deliver the merchandise or to furnish the work, labor or material to the corporation; denies that the merchandise sold or the work, labor or material furnished to the corporation was as this specified

instance and request; denies that he at any time represented to plaintiffs that the corporation was "a project of the Republic of Greece and that the Republic of Greece was definitely associated with and financially interested in said Greek Exhibits, Inc., a corporation, and that moneys would be furnished by the Republic of Greece with which to pay the financial obligations of the Greek Exhibits, Inc., a corporation. 3. This defendant denies that the plaintiffs relied on any such representation as is alleged in paragraph No. 3 of said Complaint. 4. This defendant denies the allegations contained in paragraph 4 of said Complaint. 5. This defendant further answering denies that the Greek Exhibits, Inc., a corporation, has not paid for the goods, wares and merchandise or work, labor and materials furnished or sold by the plaintiffs but on the contrary states that the plaintiffs herein separately and at different times entered into agreements in writing with said Greek Exhibits, Inc., a corporation, and that in the provisions to said written agreements with the Greek Exhibits, Inc., a corporation, the plaintiffs sold and delivered goods, wares and merchandise and furnished work, labor and materials to said Greek Exhibits, Inc., a corporation, and that in the said agreement in writing it was stipulated that payment for said goods, wares and merchandise and work, labor and materials furnished was to be made by said Greek Exhibits, Inc., a corporation. That the said Greek Exhibits, Inc., a corporation, had paid on account to the plaintiff Carney Construction Co., a corporation, the sum of \$2,500.00; that said corporation had paid on account to the plaintiff Chas. C. Breyer Co., a corporation, on account of its indebtedness the sum of \$1,200.00. 5. This defendant further answering denies that the plaintiffs herein suffered damages aggregating the sum of \$3,472.65 or any other amount." The cause was tried with a jury on November 9, 1936, and at the close of

instance and request; denies that he at any time represented to plaintiffs that the corporation was "a project of the Republic of Greece and that the Republic of Greece was definitely associated with and financially interested in said Greek Exhibits, Inc., a corporation, and that money would be furnished by the Republic of Greece with which to pay the financial obligations of the Greek Exhibits, Inc., a corporation. 3. This defendant denies that the plaintiffs relied on any such representation as is alleged in paragraph No. 3 of said Complaint. 4. This defendant denies the allegations contained in paragraph 4 of said Complaint. 5. This defendant further avers and denies that the Greek Exhibits, Inc., a corporation, has not paid for the goods, wares and merchandise or work, labor and materials furnished or sold by the plaintiffs but on the contrary states that the plaintiffs herein separately and at different times entered into agreements in writing with said Greek Exhibits, Inc., a corporation, and that in the provisions to said written agreements with the Greek Exhibits, Inc., a corporation, the plaintiffs sold and delivered goods, wares and merchandise and furnished work, labor and materials to said Greek Exhibits, Inc., a corporation, and that in the said agreement in writing it was stipulated that payment for said goods, wares and merchandise and work, labor and materials furnished was to be made by said Greek Exhibits, Inc., a corporation. That the said Greek Exhibits, Inc., a corporation, had paid on account to the plaintiff Garney Construction Co., a corporation, the sum of \$2,500.00; that said corporation had paid on account to the plaintiff Chas. J. Meyer Co., a corporation, on account of its indebtedness the sum of \$1,300.00. 6. This defendant further avers and denies that the plaintiffs herein suffered any loss or diminution of the sum of \$3,472.85 or any other amount." The case was tried with a jury on November 9, 1936, and at the close of

all the evidence the court directed a verdict for defendant John Dritsas, which the jury forthwith returned, and judgment was entered thereon. The jury returned a verdict for plaintiff Edward Hines Lumber Company and against the remaining defendant, assessing damages in the sum of \$729.82; a separate verdict for plaintiff Charles C. Breyer Company, assessing damages in the sum of \$1,254; and a separate verdict for plaintiff Carney Construction Company, assessing damages in the sum of \$1,488.83. Defendant moved for judgments notwithstanding the verdicts, for a new trial, and in arrest of judgments, all of which motions were denied. Separate judgments were entered in accordance with the verdicts, from which defendant prosecutes this appeal.

Defendant urges that under the law, (I) fraud is never presumed but must be proved as a fact by clear and convincing evidence; (II) to recover in an action for fraud and deceit plaintiffs must allege and prove each and all of the following elements of such action, namely: (a) that the representation was made by the defendant to the plaintiff and was in form a statement of a past or existing fact; (b) that the statement was false; (c) that the defendant intended to deceive the plaintiffs; (d) that the statements were material; (e) that the defendant made the statements with knowledge of their falsity; (f) that the plaintiffs, exercising ordinary prudence against deception and fraud, relied on the statements; (g) that the damage suffered by plaintiffs was the necessary and proximate consequence of the tort; (III) the complaint in an action for fraud and deceit must allege all of the essential elements of such action; (IV) the court erred in instructing the jury; (V) the court erred in admitting the plans in evidence; and (VI) the statement of account and the invoice of Hines Co. were improperly admitted in evidence. This statement of the general rule as to allegations and proof in

All the evidence the court directed a verdict for defendant. The jury returned a verdict for plaintiff against the lumber company and against the remaining defendant, assessing damages in the sum of \$120.82; a separate verdict for plaintiff against the Sawyer Company, assessing damages in the sum of \$1,954; and a separate verdict for plaintiff against the remaining defendant, assessing damages in the sum of \$1,488.33. Defendant moved for judgment notwithstanding the verdict, for a new trial, and in extent of judgment, all of which motions were denied. Separate judgments were entered in accordance with the verdicts, from which defendant prosecuted this appeal.

Defendant urges that under the law, (I) fraud is never presumed but must be proved as a fact by clear and convincing evidence; (II) to recover in an action for fraud and deceit plaintiff must allege and prove each and all of the following elements of such action, namely: (a) that the representation was made by the defendant to the plaintiff and was in fact a statement of a past or existing fact; (b) that the statement was false; (c) that the defendant intended to deceive the plaintiff; (d) that the statements were material; (e) that the defendant made the statements with knowledge of their falsity; (f) that the plaintiff, exercising ordinary prudence against description and fraud, relied on the statements; (g) that the damage suffered by plaintiff was the necessary and proximate consequence of the tort; (III) the complaint in an action for fraud and deceit must allege all of the essential elements of such action; (IV) the court tried in instructing the jury; (V) the court erred in admitting the plans in evidence; and (VI) the statement of account and the invoice of H. H. H. were improperly admitted in evidence. This statement of the general rule as to allegations and proof in

actions for fraud and deceit appears to be correct. The sixth, or last, point urged by defendant is that the statement of account and the invoice of Hines Company were improperly admitted in evidence. In addition to the testimony of the witness Joseph J. Archibald and the fact that the claim had been proved in the bankruptcy court, it will be observed that the complaint had attached thereto the itemized statement of plaintiff Edward Hines Lumber Company, and that the answer, while denying that the goods, wares and merchandise were delivered and the work, labor and material furnished at the special instance and request of defendant, does not deny that the goods, wares and merchandise were delivered or that the labor and materials were furnished to the corporation. In fact, paragraph 5 of the answer avers agreements entered into at different times between plaintiffs and the corporation in which there were stipulations that payment for the goods, wares and merchandise and work, labor and materials furnished was to be made by the corporation and that the corporation paid on account to plaintiff Carney Construction Company \$2,500, and to plaintiff Chas. C. Breyer Company \$1,200. Hence, there was no issue as to the delivery of the goods, wares and merchandise nor as to the furnishing of work, labor and materials to the corporation, and the court's action in admitting the statement of account and invoice was proper. Point IV complains about the giving of an instruction. The instruction is a statement of the allegations of the statement of claim, and told the jury that the burden was upon plaintiffs to establish the facts by a preponderance of the evidence. Defendant says that the instruction was erroneous and misleading. A careful consideration of the instruction and of the other instructions given, mainly at the request of defendant, convinces us that the instruction complained of was not erroneous nor misleading.

The general principles which authorities discuss in the

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burden was upon plaintiff to establish the facts by a preponderance
all portions of the statement of claim, and told the jury that the
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statement of account and invoice was proper. Being IV complaining about
materials to the corporation, and the entire action in obtaining the
wares and merchandise not as to the furnishing of work, labor and
I, 1906. Hence, there was no issue as to the delivery of the goods,
attraction Company, Inc., and to plaintiff James C. Greer Company
and that the corporation held an account to plaintiff Greer Com-
work, labor and materials furnished was to be made by the corporation
stipulations that payment for the goods, wares and merchandise and
times between plaintiff and the corporation in which there were
paragraph 5 of the answer covers accounts entered into at different
labor and materials were furnished to the corporation. In fact,
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therefore the itemized statement of plaintiff does not show number
ruptcy court, it will be observed that the defendant had attached
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action for fraud and deceit appears to be correct. The sixth

law of fraud must be considered and given particular application with respect to the facts of each case. For that reason it becomes necessary to consider whether the facts in the instant case warrant the verdict as to each plaintiff. Defendant was president of Greek Exhibits, Inc., which was a corporation organized to take part in A Century of Progress at Chicago in 1934. In March, 1934, Joseph J. Archibald, credit manager of Hines Company, was requested by plaintiff Carney Construction Company to obtain information for the latter concerning Greek Exhibits, Inc. Thereafter, about March 25, 1934, Archibald called on defendant in the office of Greek Exhibits, Inc., in the Bankers Building at 105 West Adams street, Chicago. The offices of defendant and of Mr. Archibald, as credit manager for the Hines Company, were in the same building. He talked with defendant in the presence of another party, whom he identified as Mr. Anthony Polemi. He testified that he asked defendant what the Greek Exhibits, Inc. was and that the latter answered, "Well, it is a Greek Government project;" that witness said, "You mean it is being subsidized by the Greek Government?" and defendant said, "Yes." Witness inquired, "Just what is the routine to procure a settlement?" and defendant said, "Just as soon as your bills come in here we will have them approved and paid." Witness stated that he "conveyed that information -". He related that he had another conversation about three weeks later pertaining to the payment of an account; that defendant did not at any time show him any plans; that he saw plaintiffs' exhibits 1-A, 1-B and 1-C "when the Carney Construction Company came into the office." The three exhibits as well as plaintiffs' exhibits 12A, 12B and 12C all contain a legend, in large letters, "GREEK GOVERNMENT PROJECT," and on said exhibits also appears: "Location A CENTURY OF PROGRESS Joachim Guarino - Designer J. Kenny Johnson - Structural Engineer." The witness further testified that it was his duty to approve credits on behalf of the Hines Company; that after the conversation he first related the

law of fraud must be considered and then defendant's position with respect to the facts of each case. For that reason it becomes necessary to consider whether the facts in the instant case warrant the verdict as to each plaintiff. Defendant was president of Greek Exhibits, Inc., which was a corporation organized to take part in A Century of Progress at Chicago in 1934. In March, 1934, Joseph J. Archibald, credit manager of Hines Company, was requested by plaintiff Carney Construction Company to obtain information for the latter concerning Greek Exhibits, Inc. Thereafter, about March 22, 1934, Archibald called on defendant in the office of Greek Exhibits, Inc. in the Bankers Building at 107 West Adams Street, Chicago. The offices of defendant and of Mr. Archibald, as credit manager for the Hines Company, were in the same building. He talked with defendant in the presence of another party, whom he identified as Mr. Anthony Koloni. He testified that he asked defendant what the Greek Exhibits, Inc. was and that the latter answered, "Well, it is a Greek Government project;" that witness said, "You mean it is being subsidized by the Greek Government?" and defendant said, "Yes." Witness inquired, "That what is the routine to procure a settlement?" and defendant said, "That as soon as your bills come in here we will have them approved and paid." Witness stated that he "conveyed that information -". He related that he had another conversation about three weeks later pertaining to the payment of an account; that defendant did not at any time show him any plans; that he saw plaintiffs' exhibits 1-A, 1-B and 1-C "when the Carney Construction Company came into the office." The three exhibits as well as plaintiffs' exhibits 12B and 12C all contain a legend in large letters, "GREEK GOVERNMENT PROJECT," and on said exhibits also appears: "Location A CENTURY OF PROGRESS JOSEPH J. ARCHIBALD - Designer J. Lemmy Johnson - Structural Engineer." The witness further testified that it was his duty to approve credits on behalf of the Hines Company; that after the conversation he first related the

Hines Company furnished goods to the corporation; that the basis for credit was "the fact that Mr. Manta had told me the bills would be paid and the fact that he was subsidized by the Greek Government and that it was a Greek Government project;" that in July, 1934, he received a check for \$100 from defendant on the grounds of the corporation at A Century of Progress. The check was introduced as Exhibit 7 and was drawn by "Greek Exhibits Incorporated J. L. Manta." The check was returned marked "Not Sufficient Funds." There was then introduced the petition of the three (plaintiff) corporations filed in the United States District Court asking to have Greek Exhibits, Inc. adjudicated a bankrupt, the order of adjudication in bankruptcy, and a copy of the final distribution in the bankruptcy court showing that no payments were made to any of plaintiffs. On cross-examination, in answer to a question as to whether he requested a credit report as to the credit of the corporation, he answered that he could not recall; that he recalled getting financial data on defendant; that he did not make any inquiries at any banks in Chicago or of the Greek consul, or of the Greek ambassador, as to whether the Greek Government was financially interested in the venture; that the second conversation that he had with defendant was about the collection of the Garney Company account, and that a written contract was made between the Hines Company and the corporation. In the first interview Archibald was acting for the Garney Company. Nevertheless, when credit was eventually extended to the corporation by the Hines Company defendant knew that he had previously made the quoted statements to Mr. Archibald. In the normal course of conduct laymen, not anticipating a lawsuit, would not again repeat the conversation that had theretofore taken place. It follows that the Hines Company also had a right to rely on the statement. William Breyer, a witness on behalf of plaintiffs, testified that he is a plumbing contractor and

vice president and secretary of plaintiff Charles C. Breyer Company, and he identified itemized statements of the account of his company with the corporation. Charles Gleixner, on behalf of plaintiffs, stated that he is a general contractor connected with Garney Construction Company; that he is superintendent, foreman and worker; that he first met defendant in March, 1934; that the occasion of the meeting was a call from Mr. Polemi to come to Mr. Manta's office and pick up a set of plans; that he did not have any conversation with defendant at that time concerning the subject matter of the instant suit; that he went in to see the engineering and drafting department in order to pick up a set of plans and give an estimate; that Mr. Manta introduced him to Mr. Johnson and Mr. Guarino; that Manta's office was at 105 West Adams street; that witness went back to the office a week later and saw Mr. Johnson and Mr. Guarino; that witness saw Mr. Manta on his third visit there; that witness said, "Here is the cost estimate on this project;" that defendant said, "I will let you know;" that witness went to defendant's office about April 20 but did not see him; that he went there about a week later and talked to defendant; that he gave defendant the estimate on the project and defendant said, "That is all right. You can go ahead." Witness stated further that "he [defendant] said he was the agent and doing the paying, the money was all here. That is all he said to me. He said the money was all here and he was doing the paying. Then I reported that to the office and we called the Edward Hines Lumber Company credit department." The court stated, "You said earlier in the testimony something about being an agent," and the witness replied, "That he was the agent for the project, yes." Witness further testified that he saw exhibits 12A, B and C at defendant's office about April 20, 1934; that he also saw exhibits 1A, B and C at defendant's office; that Mr. Johnson, the engineer for Mr. Manta, gave him the exhibits; that Mr. Johnson was

vice president and secretary of plaintiff Charles C. Dwyer Company, and he identified itemized statements of the account of his company with the corporation. Charles Dwyer, on behalf of plaintiff, stated that he is a general contractor connected with Garvey Construction Company; that he is superintendent, foreman and worker; that he first met defendant in March, 1934; that the occasion of the meeting was a call from Mr. Manta to come to Mr. Manta's office and pick up a set of plans; that he did not have any conversation with defendant at that time concerning the subject matter of the instant suit; that he went in to see the engineering and drafting department in order to pick up a set of plans and give an estimate; that Mr. Manta introduced him to Mr. Johnson and Mr. Guarino; that Manta's office was at 105 West 42nd Street; that witness went back to the office a week later and saw Mr. Johnson and Mr. Guarino; that witness saw Mr. Manta on his third visit there; that witness said, "Here is the cost estimate on this project;" that defendant said, "I will let you know;" that witness went to defendant's office about April 20 but did not see him; that he went there about a week later and talked to defendant; that he gave defendant and the estimate on the project and defendant said, "That is all right. You can go ahead." Witness stated further that "he [defendant] said he was the agent and doing the paying, the money was all here. That is all he said to me. He said the money was all here and he was doing the paying. Then I reported that to the office and he called the Grand Union Building Company of the defendant." The court stated, "You said earlier in the testimony something about being an agent," and the witness replied, "That he was the agent for the project, yes." Witness further testified that he saw exhibits 12A, B and C at defendant's office about April 20, 1934; that he also saw exhibits 1A, B and C at defendant's office; that Mr. Johnson, the engineer for Mr. Manta, gave him the exhibits; that Mr. Johnson was

one of the gentlemen introduced to witness by defendant; that witness took exhibit 1 to the Hines Company and exhibited such plans to Mr. Archibald of the credit department, and left them with the Hines Company; that a contract was entered into after the conversation with defendant and after witness saw plaintiffs' exhibits 1 and 12. He also testified about the account. The plans and specifications were admitted over defendant's objection. On redirect examination witness stated that he inquired about the credit responsibility of the corporation of Mr. Archibald of the Hines Company. Irvin P. Austin, for plaintiffs, testified that he is a plumbing estimator associated with Charles C. Breyer Company; that he first met defendant in defendant's office in the Bankers Building around the middle of April, 1934; that Mr. Polemi introduced him to defendant; that Mr. Polemi asked him if he would make a mechanical layout of a building project at the Century of Progress and draw up the specifications so that the project could go ahead; that he helped them to make their layout; that he estimated the job; that nothing further was said at that time; that he saw defendant after that in the room adjacent to his office where their architect was working drawing up plans; that the conversation was had around the middle of April, 1934; that defendant explained they wanted information in regard to sinks, etc.; that witness saw defendant again in the same office a few days later; that defendant told him to work with Mr. Guarino; that defendant left the room; that then Guarino made pencil sketches and witness worked with him; that he had another conversation with defendant a week later; that he told defendant what the job would run to; that defendant wanted to see if the job could be done cheaper; that witness had another conversation with defendant about two days later; that a contract was signed between the Breyer Company and the corporation; ~~that he did not have any~~

that he did not have any conversation with defendant in respect to who was responsible for the payment of the work; that "we worked on Plaintiff's exhibits marked 13A, B, C and D for identification in Mr. Manta's architect's office between the middle of April possibly the 1st of May, 1934. Mr. Guarino showed them to me in the presence of Mr. Manta. This was previous to the execution of our contract." John L. Manta, on his own behalf, testified that he did not have a conversation with Mr. Archibald the latter part of March, 1934; that the only time he had a conversation with Archibald was after Hines Company had a bill against the corporation around the 15th of May; that prior to then he did not see Archibald in his office or at the grounds; that the first time he saw Archibald was at the grounds toward the end of June; that witness was president of the corporation; that his office was on the twenty-first floor at 105 West Adams street; that he had an architect named Guarino in the office in March or April, 1934. John Kenney Johnson, for defendant, testified that he is a structural engineer; that in the spring of 1934 he had a limited partnership with Joe Guarino on the corporation's project; that he prepared plans and specifications for the corporation; that he began such plans about March 17, 1934; that he was on the building at the grounds until June 26, 1934; that the plans were made by Mr. Guarino and himself; that the plans represent the space in the Hall of States preliminary to the contract; that the plans were used when the work was let out. Anthony Polemi, a witness who testified on behalf of defendant, could not recall whether he was present at a meeting between Mr. Archibald and defendant; but stated he saw Mr. Archibald somewhere.

Under point III defendant maintains that in an action for fraud and deceit the complaint must allege the essential elements of such action. That is a correct statement. Defendant in this case did not move to dismiss or to strike the complaint. He did

that he did not have any conversation with defendant in respect to who was responsible for the payment of the work; that he worked on defendant's machine marked J. B. O and a for identification in Mr. Mante's architect's office between the middle of July possibly the last of May, 1934. Mr. Corning showed them no in the presence of Mr. Mante. This was previous to the execution of our contract." John L. Mante, on his own behalf, testified that he did not have a conversation with Mr. Reichheld the latter part of March, 1934; that the only time he had a conversation with Reichheld was after Mante Company had a bill against the corporation amounting the last of May; that prior to that he did not see Reichheld in his office or at the grounds; that the first time he saw Reichheld was at the grounds toward the end of June; that Mante was president of the corporation; that his office was on the twenty-first floor at 103 West 42nd Street; that he had an architect named Manning in the office in March or April, 1934. John Kennedy Johnson, for defendant, testified that he is a structural engineer; that in the spring of 1934 he had a limited partnership with Joe Manning on the corporation's project; that he prepared plans and specifications for the corporation; that he began such plans about March 17, 1934; that he was on the building at the grounds until June 20, 1934; that the plans were made by Mr. Manning and himself; that the plans represent the space in the hall of fifteen preliminary to the contract; that the plans were read when the work was let out. Anthony Wolcott, a witness who testified on behalf of defendant, could not recall whether he was present at a meeting between Mr. Reichheld and defendant; but stated he saw Mr. Reichheld somewhere.

Under point III defendant maintains that in an action for fraud and deceit the complaint must allege the essential elements of such action. That is a correct statement. Defendant in this case did not move to dismiss or to strike the complaint. He did

move in arrest of judgment "for the reason that the complaint of the above named plaintiffs is insufficient at law to sustain judgment thereon," without specifying any grounds. Sec. 169, ch. 110, Ill. Rev. Stat. 1937 (sec. 45, Civil Practice Act), provides that "(1) All objections to pleadings heretofore raised by demurrer shall be raised by motion. Such motion shall point out specifically the defects complained of, and shall ask for such relief as the nature of the defects may make appropriate, such as the dismissal of the action or the entry of a judgment where a pleading is substantially insufficient in law, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth. (2) Where a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein such pleading or division thereof is insufficient. (3) After rulings on motions, the court may make such orders as to pleading over or amending as may be just. (4) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered in so far as they are material to the ruling sought." Had defendant in due time moved to strike or dismiss the complaint it would have been incumbent on him to specify wherein the pleading was insufficient, and a motion in arrest of judgment, particularly where there was no prior motion, should likewise specify. Where the motion specifies the objection the plaintiff would have the opportunity of amending his pleading to conform to the objection if he determined that the objection had merit. The point that the complaint is defective is not well taken.

In determining whether there is evidence in the record which justifies the verdict as to each plaintiff the jury had a right

move in arrest of judgment "for the reason that the complaint of the above named plaintiff is insufficient as law to sustain judgment thereon," without specifying any grounds. Sec. 126, Civ. Prac. Act, Ill. Rev. Stat. 1937 (sec. 45, Civil Practices Act), provides that "(1) If objections to pleadings heretofore raised by demurrer shall be raised by motion. Such motion shall point out specifically the defects complained of, and shall ask for such relief as the nature of the defects may make appropriate, such as the dismissal of the action or the entry of a judgment where a pleading is substantially insufficient in law, or that a pleading be made more definite and certain in a specified particular, or that certain matters be stricken out, or that necessarily parties be added, or that certain misjoined parties be dismissed, and so forth. (2) Where a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein such pleading or division thereof is insufficient. (3) After rulings on motions, the court may make such orders as to pleading over or amending as may be just. (4) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered in so far as they are material to the ruling sought." Had defendant in due time moved to strike or dismiss the complaint it would have been incumbent on him to specify wherein the pleading was insufficient, and a motion in arrest of judgment, particularly where there was no prior motion, should likewise specify. Where the motion specifies the objection the plaintiff would have the opportunity of amending his pleading to conform to the objection if he determined that the objection had merit. The point that the complaint is defective is not all taken. In determining whether there is evidence in the record which justifies the verdict as to each plaintiff the jury had a right

to consider all of the evidence for the purpose of showing a fraudulent method or design on the part of defendant. In Wood v. U. S., 10 L. Ed. 987, the court said (p. 994):

"The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent, or motive in the particular act, directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act taken by itself may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

Section 23 of the Civil Practice Act (sec. 147, ch. 110, Ill. Rev. Stat. 1937), providing for the joinder of plaintiffs, states that "if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such order as may be expedient." In the instant case there was no motion for a separate trial of the issues as to the three plaintiffs, and the evidence was received without limitation. Nevertheless, bearing in mind the rule announced in Wood v. U. S., supra, it was necessary for each plaintiff here to establish the fraud as charged. Defendant Manta was president of the corporation and there is evidence that he was the dominating factor in its affairs. The architect and engineer had space in his office. In March, 1934, when at the request of the Carney Company Mr. Archibald, of the Hines Company, called on defendant, the latter stated that "it is a Greek Government project;" when asked, "You mean it is being subsidized by the Greek Government," he answered, "Yes;" and in answer to the inquiry as to the routine in procuring a settlement he answered, "Just as soon as your bills come in here we will have them approved and paid." Archibald testified that the information "was conveyed," from which the jury would have the right to infer that the information was given to the Carney Company. The plans and specifications were not given to Archibald by defendant. Archibald saw the plans when

to consider all of the evidence for the purpose of showing a fraudulent method or design on the part of defendant. In Good v. U.S., 10 L. Ed. 287, the court said (p. 284):

"The question was one of fraudulent intent or not, and upon questions of that sort, where the intent of the party is in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent, or motive in the particular act, directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act taken by itself may not be decisive either way; but when taken in connection with other acts of the same kind and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

Section 23 of the Civil Practice Act (Sec. 147, Ch. 111, N.Y. Stat. 1937), providing for the joinder of plaintiffs, states that

"If upon the application of any party it shall appear that such joinder may expedite or delay the trial of the action, the court may order separate trials or make such order as may be expedient."

In the instant case there was no motion for a separate trial of the issues as to the three plaintiffs, and the evidence was received without limitation. Nevertheless, bearing in mind the rule announced in Good v. U.S., supra, it was necessary for each plaintiff here to establish the fraud or conspiracy. Defendant sought to establish the fraud and then its evidence that he was the managing factor in its affairs. The architect and engineer had space in his office in March, 1934, when at the request of the Gray Company Mr. Reichold, of the Kinco Company, called on defendant, the latter stated that "it is a Greek Government project;" when asked, "You mean it is being subsidized by the Greek Government?" he answered, "Yes;" and in answer to the inquiry as to the routine in procuring a settlement he answered, "Just as soon as your bill comes in here we will have them approved and paid." Reichold testified that the information "was conveyed," from which the jury would have the right to infer that the information was given to the Gray Company. The plans and specifications were not given to Reichold by defendant. Reichold saw the plans when

someone from the Carney Company came into his office. Archibald stated that the basis for allowing credit was the statement of Mr. Manta that "the bills would be paid and the fact that he was subsidized by the Greek Government and that it was a Greek Government project." While the Hines Company did not deliver lumber and material until after a subsequent conversation between Archibald and defendant in which Archibald was seeking to collect an account of one of the other plaintiffs, we are satisfied that the Hines Company had a right to rely on the representation of defendant. The mere fact that a bill of another concern was not paid when due would not necessarily show that the Hines Company did not exercise ordinary diligence under the circumstances. It could well be argued that when Archibald went to collect the bill for the other concern he would not be disturbed by failure on the part of the corporation to pay promptly, in view of the previous statement of defendant that it was a Greek Government project and that it was subsidized by the Greek Government. The record, as to the Carney Company, shows that defendant made a statement to Mr. Archibald, who was then acting for the Carney Company, and that the information was conveyed by Archibald presumably to the Carney Company. Mr. Gleixner testified that he obtained information as to the credit responsibility of the corporation from Mr. Archibald of the Hines Company. Defendant stated to Gleixner that he was the agent. Under all the circumstances the jury had a right to find that defendant was holding himself out as the agent for the corporation. The plans were the basis for the estimate of the Carney Company. The plans were given to Gleixner by Johnson, the engineer, who had been introduced to him by defendant, and the plans bore the legend, "GREEK GOVERNMENT PROJECT." There is evidence from which the jury had a right to decide that the plans bearing the legend "Greek Government Project" were given to the representative of the Breyer Company and that the Breyer Company in extending credit

someone from the Garney Company came into his office. Archibald
 stated that the basis for allowing credit was the statement of
 Mr. Menta that "the bills would be paid and the fact that he was
 authorized by the Greek Government and that it was a Greek Government
 project." While the Hines Company did not deliver lamps and material
 until after a subsequent conversation between Archibald and defendant
 in which Archibald was seeking to collect an account of one of the
 other plaintiffs, we are satisfied that the Hines Company had a right
 to rely on the representation of defendant. The more fact that a
 bill of another concern was not paid when due would not necessarily
 show that the Hines Company did not exercise ordinary diligence under
 the circumstances. It could well be argued that when Archibald went
 to collect the bill for the other concern he would not be dissuaded by
 failure on the part of the corporation to pay promptly, in view of
 the previous statement of defendant that it was a Greek Government
 project and that it was authorized by the Greek Government. The
 record, as to the Garney Company, shows that defendant made a state-
 ment to Mr. Archibald, who was then acting for the Garney Company,
 and that the information was conveyed by Archibald presumably to
 the Garney Company. Mr. Gleason testified that he obtained infor-
 mation as to the credit responsibility of the corporation from Mr.
 Archibald of the Hines Company. Defendant stated to Gleason that
 he was the agent. Under all the circumstances the jury had a right
 to find that defendant was holding himself out as the agent of the
 corporation. The plans were the basis for the estimate of the
 Garney Company. The plans were given to Gleason by Johnson, the
 engineer, who had been introduced to him by defendant, and the plans
 bore the legend, "GREEK GOV. PROJECT H.O.G.T." There is evidence from
 which the jury had a right to decide that the plans bearing the
 legend "Greek Government Project" were given to the representative
 of the Bryer Company and that the Bryer Company in extending credit

acted on the representation of defendant that the project was a Greek Government Project. Another criticism leveled at the judgment is that plaintiffs failed to show that the statement to the effect that the corporation was a project of the Greek Government was untrue. That objection should be considered in connection with the answer, in which defendant "denies that he at any time represented to the plaintiffs that Greek Exhibits, Inc., a corporation, was a project of the Republic of Greece and that the Republic of Greece was definitely associated with and financially interested in said Greek Exhibits, Inc., a corporation, and that moneys would be furnished by the Republic of Greece with which to pay the financial obligations of the Greek Exhibits, Inc., a corporation." Paragraph 4 of the complaint charges that the representations of the defendants were false and fraudulent, and while paragraph 4 of the answer denies the allegations contained in paragraph 4 of the complaint, such denial is somewhat inconsistent with the denial in paragraph 2 that defendant at any time represented that the corporation was a project of the "Republic of Greece," etc. Counsel for defendant told the jury as part of his opening statement that "we will further show that the Greek Exhibits, Inc., a corporation, was in no way an agency of the Greek government in Europe, here to represent the Greek government at the World's Fair in an official capacity as a real agent of the Greek government. No, we will repudiate any charge that any such statements were made, verbally or otherwise." Counsel relies on Pietsch v. Pietsch, 245 Ill. 454, and Sun Oil Co. v. Garren, 261 Ill. App. 513, as authority that an admission made in an opening statement will not excuse the introduction of testimony to supply proof of some essential element. Counsel for plaintiffs cite cases holding that such admissions are binding as against the client of counsel making them. Defendant replies that the cases cited sustain the admissions of counsel made during the trial but that the statement to the jury

in the instant case was made not during the trial but in the opening statement. As a matter of fact the trial commences when the jury is sworn to try the issues. The case of Pietsch v. Pietsch, *supra*, is not decisive of the proposition before us. That was a case in which counsel for the defendant outlined what he expected to prove and the court, without hearing any evidence, ruled that what counsel offered to prove would not constitute a defense, and accordingly directed a verdict for the plaintiff. The Supreme court reversed the judgment and remanded the cause, remarking that the parties had a right to a trial by jury of the issues made by the pleadings. It is obvious that if the court could direct a verdict on the opening statement under a factual situation such as existed in the Pietsch case, it would be dangerous to make an opening statement, and would probably result in discouraging counsel from making opening statements. In the case at bar, however, the statement of counsel for defendant, taken in conjunction with his answer, would be likely to lead even an experienced and careful practitioner into the belief that it was unnecessary for him to make proof that Greek Exhibits, Inc., a corporation, was not a project of the Greek Government and that it was not subsidized by the Greek Government. Here, it is well to note that although defendant testified in his own behalf he did not say that the corporation was in fact a project of the Greek Government, thereby, in negative fashion, conforming to the opening statement of his counsel. If the corporation was in fact a project of the Greek Government and subsidized by it, certainly the defendant as president would have knowledge thereof. An examination of his answer, the statement of his counsel, and his own testimony show that he was not contending that the corporation was in fact a Greek Government project. His position was that he did not make the representations.

There was competent evidence from which the jury could

in the instant case was not a matter of fact the jury could determine. It is a matter of fact the jury is sworn to try the issues. The case of Blackburn v. Blackburn, 100 N.D. 100, is not decisive of the proposition before us. That was a case in which counsel for the defendant testified that he expected to prove and the court, without hearing any evidence, ruled that such counsel offered to prove would not constitute a defense, and accordingly directed a verdict for the plaintiff. The Supreme Court reversed the judgment and remanded the cause, stating that the plaintiff had a right to a trial by jury of the issues made by the plaintiff. It is obvious that if the court could direct a verdict on the plaintiff's statement under a factual situation such as existed in the Blackburn case, it would be dangerous to make an appeal at all, and would probably result in discrediting counsel from making opening statements. In the case at bar, however, the statement of counsel for defendant, taken in conjunction with his answer, would be likely to lead even an experienced and careful jurist to believe that it was unnecessary for him to make proof of such matters, Inc., a corporation, was not a project of the Greek Government and that it was not subsidized by the Greek Government. It is well to note that although defendant testified in his own behalf he did not say that the corporation was in fact a project of the Greek Government, thereby, in his testimony, conforming to the opening statement of his counsel. If the corporation was in fact a project of the Greek Government and subsidized by it, certainly the defendant as president would have knowledge thereof. An examination of his answer, the statement of his counsel, and his own testimony, show that he was not contending that the corporation was in fact a Greek Government project. His position was that he did not make the representations.

There was competent evidence from which the jury could

decide that defendant made representations that Greek Exhibits, Inc. was a Greek Government project and subsidized by the Greek Government, which were statements of existing facts; that the statements were false; that defendant knew the statements were false; that he intended to deceive plaintiffs by the statements; that the statements were material; that plaintiffs had a right to rely on the statements; and that plaintiffs did rely on the statements and suffered damages as a consequence. While nations with which our Republic was associated in the World War have defaulted on their debts, nevertheless, the average citizen habitually places great reliance on engagements of governments. The only purpose of placing the legend "Greek Government Project" on the plans and specifications, when there was no authority from the Greek Government so to do, would be to lead creditors and others into the belief that such project was actually backed by the Greek Government. A person seeing such a legend would be disarmed from suspecting that the statement was false. It takes a bold and reckless person indeed to state that the corporation of which he is president is a project of a sovereign nation, when such is not the fact. In this connection defendant urges that if plaintiffs had exercised ordinary prudence they would not have been deceived, and points out that plaintiffs could have made inquiry of the Greek consul or the Greek minister. The rule stated in Harpich v. Williams, 300 Ill. 540, 546, that

"Where one party to a transaction makes a positive statement of a material fact as true which he knows to be false but intends to be relied upon by the other party as true, and the statement actually is relied and acted upon as true by the other party, the party making the statement cannot charge the other with negligence in believing the false statement or take any benefit from it." Gilbey v. Hamlin, 297 Ill. 258,"

is applicable. A careful examination of the record convinces us that there was competent evidence before the jury, under the issues presented by the pleadings, on which to return the verdicts, and that the court was right in entering a judgment for each of the plaintiffs

and against defendant.

Therefore, the three judgments of the Superior court of Cook county, one in favor of plaintiff Edward Hines Lumber Co., a corporation, and against defendant, for \$729.82; one in favor of plaintiff Carney Construction Co., a corporation, and against defendant, for \$1,488.83; and one in favor of plaintiff Chas. C. Breyer Co., a corporation, and against defendant, for \$1,254, are severally affirmed.

JUDGMENTS AFFIRMED.

Sullivan and Friend, JJ., concur.

and against defendant.

Therefore, the three judgments of the Superior Court of Cook County, one in favor of Plaintiff Edward Hines Lumber Co., a corporation, and against defendant, for \$789.83; one in favor of Plaintiff Garney Construction Co., a corporation, and against defendant, for \$1,488.83; and one in favor of Plaintiff John C. Brewer Co., a corporation, and against defendant, for \$1,184, are severally affirmed.

IN WITNESS WHEREOF,

William and Edward, Jr., clerks.

39588

THOMAS E. TALLMADGE and VERNON S.
WATSON, co-partners, doing business
under the firm name and style of
TALLMADGE AND WATSON,

Appellees,

v.

JOSEPH BEUTTAS,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

208 T. A. 624³

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered against him on March 2, 1937, in the Circuit Court of Cook County for the sum of \$1,750.00 and costs. The judgment was entered on the verdict of a jury.

The charge in the complaint is that plaintiffs, architects, are entitled to recover for certain fees alleged to be due them for services rendered to the defendant in the design and construction of the Colonial Village, a concession at the 1934 Century of Progress in Chicago, under a written contract entered into between plaintiffs and defendant in February, 1934. The contract is a lengthy one containing certain details, but the pertinent portions thereof, insofar as this action is concerned, are as follows:

"The owner agrees to pay the architects a fee based on 6% of the construction costs of the buildings; this to include the pipe and mechanical trades but not to include landscaping or decorating. The owner agrees to pay the architects 2% on landscaping, planting, pavements, etc., provided the architects make plans, specifications and superintends this work. The architects agree to assist in every way possible to make the enterprise a success but such work shall be optional with them and only to the degree that they are able or willing to do it.

"The owner shall pay, apart from this contract, for any survey of the premises and for any chemical and mechanical tests which may be necessary.

"The owner shall give prompt and thorough consideration to all documents relating to this work presented by the architects and shall inform the architects of all decisions thereon within a reasonably prompt time so as not to delay work unnecessarily."

Plaintiffs claim that they performed all things required under the contract, that they made designs for signs not required,

the fair compensation of which is \$125.00; that plaintiffs, as architects, were to receive as compensation from the defendant, based upon a percentage of cost, six per cent of construction cost of the building, including pipe and mechanical trades, and two per cent on landscaping, planting, pavements, etc., provided plaintiffs make plans and superintend the same; that plaintiffs made plans for landscaping and paving; that the costs of landscaping, etc., were not less than \$4,000.00 and the construction cost \$93,280.87; that plaintiffs received \$4,000.00 on account and claim that there is due "a greater total balance" than \$1,726.85.

Defendant, on his part, in his answer claims that the signs mentioned in the complaint were voluntarily and gratuitously built as a part of plaintiffs' contract, and that a considerable portion of the construction cost had not, at the time of the filing of the answer, been ascertained. Defendant also charges that the plans drawn for the building were out of proportion or improperly constructed, were defective impractical and unusable and required numerous changes and alterations; that such plans were prepared without skill, were not artistic, workable or practical, and that defendant was compelled to pay out the sum of \$626.70 in the alteration of these plans. Defendant further denies that he is indebted to the plaintiffs in any amount, and asks judgment against plaintiffs for the sum of \$626.70.

As near as we can gather from the record and the briefs of the parties, the construction of these World's Fair buildings and the work done in connection therewith, was all done by the B-W Construction Company, of which defendant was the president. On the trial it was stipulated that in lieu of the original books and records of the B-W Construction Company, there might be introduced in evidence by either party a compilation of the items appearing on these books as expenditures incurred in connection with the Colonial Village, it being understood, however, that the introduction in evidence of this

compilation should not preclude the plaintiffs from maintaining that all items of construction cost were not contained therein, nor preclude the defendant from maintaining that certain items mentioned therein should not be construed as construction cost.

Plaintiff, Tallmadge, testified, in effect, that after the contract between the parties had been entered into, there were consultations between the witness, defendant, a Mr. Owings and a man named Mr. Skidmore of the Century of Progress, as to the design of the village, and that Mr. Skidmore was the architect in charge of the Century of Progress and Chief of concessions; that there were conferences before the signing of the contract, presumably with these people; that "we", evidently meaning plaintiffs, had made a preliminary sketch which was discussed, and the character and design of the buildings to be erected, were considered. He also testified that plaintiffs had done a great deal of research, had correspondence with the managers and owners of historic buildings in an effort to procure original documents. He further testified to the effect that the plans and drawings of the village were prepared in his office, that engineers were employed to lay out the utilities, make engineering drawings, locate lines and plumbing fixtures and design the structural members of the buildings; that before construction had commenced, everything had been done in the way of original plans, except full sized details for ornaments, and that during the construction of these buildings, changes were made frequently and suggestions given by the architect to the defendant as to additions and changes; that at the time of the construction, the opinion of the witness was that the minimum cost of the entire construction would be \$100,000.00; that it was the custom in the architectural profession and building trades to charge overhead as a part of the construction cost, and that where no record of the exact overhead is submitted to the architect by the contractor or

owner, they figure on a minimum of eight per cent; that certain work done by other persons than the B-W Construction Company consisted of putting mastic paint on certain buildings, in imitation of real brick; that decorating in architectural or construction work means covering paint, calomine or wall paper, muslin or plaster surfaces on the interior of a building, and that painting means covering portions of the buildings which would deteriorate under action of the elements unless covered with paint, and that decorating is never applied to outside work. He further testified to the effect that plaintiff received from the defendant the sum of \$4,000.00; that after the completion of the work, he talked to defendant concerning a balance which he claimed to be due from defendant, in which he stated to the defendant that in the opinion of the witness, the building had cost \$135,000.00; that defendant stated that the cost was much less and offered to allow plaintiffs, or their agent, to examine the books, and that a man named Goo, employed by plaintiffs, did examine the books of the defendant. He also testified that after the construction was entirely completed, Goo made certain signs for streets, comfort stations etc., twenty two in number, the fair price of which was \$125.00.

We have already stated that the witness Tallmadge had stated that the minimum cost of the entire structure would be \$100,000.00. His testimony, in detail, on this question, is as follows:

"Q. Based upon your learning and experience as an architect and upon your knowledge of the construction of the Colonial Village, did you have any opinion at the time it was constructed as to the cost of construction at the time the construction took place, meaning the lowest or minimum possible cost and excluding from any such estimate, pavement, landscaping and decorating? The question is did you have an opinion at that time.

"A. Yes.

"Q. What was that opinion?

"Objection. Objection overruled.

"A. \$100,000.00.

"Q. Now, Mr. Tallmadge I am going to ask you whether or not in the computation of architects charges based upon a percentage, there is or is not a custom in the architectural

...they fit up on a minimum of effort; that was in
work done by other means than the 4-1 Construction Company
consisted of putting waste paint on certain buildings, in imitation
of real brick; that decorative in construction or construction
work means covering paint, coloring or wall paper, and that painting means
surface on the interior of a building, and that painting means
covering portions of the building which would otherwise be
section of the elements, unless covered with paint, and that decorative
is never applied to outside work. He further testified to the
effect that plaintiff received from the defendant the sum of \$4,000.00;
that after the completion of the work, he failed to return
concerning a balance which he claimed to be due from defendant,
in which he stated to the defendant that in the opinion of the
attorney, the building had cost \$15,000.00; that defendant stated
that the cost was much less and offered to allow plaintiff, or their
agent, to examine the books, and that a man named Joe, employed by
plaintiff, did examine the books of the defendant, he also testi-
fied that after the construction was entirely completed, the work
certain signs for electric, comfort stations etc., twenty two in
number, the price of which was \$125.00.
He next testified that the witness Williams had
stated that the balance cost of the entire structure would be
\$100,000.00. His testimony, in detail, on this question, is as
follows:

"Q. Based upon your learning and experience as an
architect and upon your knowledge of the construction of the
Colonial Village, did you have any opinion at the time it was
constructed as to the cost of construction at the time the
construction took place, excluding the lowest or minimum possible
cost and excluding from any estimate, payment, rent,
occupancy, and depreciation? The question is did you have an
opinion at that time.
A. Yes.
Q. What was that opinion?
A. That the construction was overvalued.
Q. How, in your opinion, I am going to ask you whether
or not in the construction of Colonial Village based upon a
percentage, there is or is not a question in the construction

profession and in the construction industry and in the building trades, to charge as a part of the construction cost an overhead cost and percentage?

"Objection. Objection overruled.

"A. It is a custom.

"Q. And where no record of exact overhead cost is submitted to the architect by the contractor or owner by whom he is employed, is there a custom or not a custom as to there being used a definite percentage of the actual construction costs to determine that overhead?

"Objection. Objection overruled.

"A. There is a custom. It is a custom to add - figure on a certain percentage.

"Q. I will ask you then what that percentage is, and by that I mean not what might be charged in some cases, but the minimum percentage to which the custom applies.

"Objection. Objection overruled.

"A. Eight per cent."

While many figures concerning the detailed claimed cost of the construction are contained in the record, we find nothing definite, either in the briefs or the abstract, except the answers of the plaintiff Tallmadge, upon which any computation could possibly be made of the amount of fees claimed by plaintiffs. His statement is to the effect that in his opinion, the cost of the building was \$100,000.00, and that plaintiffs are entitled to eight per cent commission on that amount. Eight per cent of \$100,000.00 would be \$8,000.00. It is agreed that plaintiffs have been paid the sum of \$4,000.00. Upon this basis, if the testimony of Tallmadge is entitled to consideration at all, plaintiffs would be entitled to be paid the further sum of \$4,000.00. All plaintiff claims is \$1,726.65. The jury's verdict of \$1,750.00 seems to be entirely arbitrary.

In view of the fact that plaintiffs have not established, by the manifest weight of the evidence, the amount which they claim they are entitled to, we are constrained to reverse the cause and remand it for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

proposed to be the estimated liability for the cost of the
 trial, to be a part of the compensation cost in every
 head not and beyond my
 "C" of the, objection overruled.
 "A. It is a matter.
 "Q. And what is the exact amount of the
 submitted to the liability of the contractor in order of work
 he is employed, is there a matter or not a matter as to the
 being held a definite liability of the actual compensation
 costs to determine that liability?
 "objection, objection overruled.
 "A. There is a matter. It is a matter to be - I think
 on a certain amount.
 "Q. I will ask you then what that compensation is, and
 by that I mean not what is to be paid in any case, but
 the minimum amount to which the matter is liable.
 "objection, objection overruled.
 "A. Right, that's right."

While they might consider the liability claim only
 of the compensation, the liability is the liability, and the liability
 definite, within the liability as the liability, toward the liability
 of the liability liability, which claim may compensation could
 possibly be made at the amount of this liability by liability. The
 statement is to the effect that in this claim, the cost of the
 building was \$100,000.00, and the liability was entitled to a
 per cent commission on that amount. If the cost was \$100,000.00,
 would be \$10,000.00. It is stated that liability was paid
 the sum of \$4,700.00. Upon this basis, if the liability of liability
 is entitled to compensation at all, liability would be entitled to
 be paid the further sum of \$4,700.00. All liability claim is
 \$1,700.00. The jury's verdict of \$1,700.00 seems to be entirely
 arbitrary.

In view of the fact that liability have not established,
 by the plaintiff out of the evidence, the amount which they claim
 they are entitled to, we are constrained to reverse the jury and
 remand it for a new trial.

REVEREND AND HONORABLE FOR A NEW TRIAL.

39588

THOMAS E. TALLMADGE and VERNON S. WATSON,
co-partners, doing business under the
firm name and style of TALLMADGE AND
WATSON,

Plaintiffs-Appellates,

v.

JOSEPH BEDTAS,

Defendant-Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

298 I.A. 624^{3A}

ON REHEARING

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

In the instant case, after examining plaintiffs' petition for rehearing, the same was granted. Upon a further review of the record, we have determined that our original conclusion was right, and that the judgment of plaintiffs should be reversed and the cause remanded for a new trial.

It is, therefore, the order of the court that the original judgment entered here shall stand.

ORIGINAL JUDGMENT ENTERED SHALL STAND.

HEREL AND DENIS E. SULLIVAN, JJ. CONCUR.

10000

THE UNITED STATES OF AMERICA
DO hereby certify that
the within and signed by me

10000 A. I. 10000

JOHN B. HARRIS

THE UNITED STATES OF AMERICA

DO hereby certify that the within and signed by me

In the month of May, 1900, I was present at the
the records, the same was signed, upon a certain date
the records, the same was signed, upon a certain date
right, and that the judgment of the court in the case
the same was signed for the year 1900.

It is, therefore, the order of the court that the
judgment of the court be signed.

Witness my hand and seal this 10th day of May, 1900.

JOHN B. HARRIS, Clerk of the Court.

40255

JOSEPH F. RYAN and H. EDWARD LINDEN,

(Plaintiffs) Appellees,

v.

WILLIAM S. BARBEE and FRANK B. PRATT,

Defendants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

On Appeal of FRANK B. PRATT,

Appellant.

298 I.A. 624⁴

MR. JUSTICE NESEL DELIVERED THE OPINION OF THE COURT.

This is an action filed in the Superior Court to recover the sum of \$8,056 together with interest thereon from March 1, 1928, alleged to be due the plaintiffs from the defendants as commissions claimed to have been earned by plaintiffs as real estate brokers, concerning a tract of land located in Du Page County, Illinois and owned by the defendant Frank B. Pratt.

The case was tried before the court without a jury and the court made a finding for the plaintiffs and against the defendant Pratt and entered judgment on the finding for \$7,705 and costs, and ordered the cause dismissed, without costs, as to the defendant Barbee. Thereafter the defendant Pratt filed a written motion to vacate the judgment and to dismiss the suit, which motion the court denied and he thereupon appealed.

The plaintiffs on January 31, 1936, filed their complaint alleging that their claim is for a real estate brokers' commission based on a written contract, dated August 26, 1926, between William S. Barbee and Nick M. Ellis, as purchasers, and Frank B. Pratt and Louise K. Pratt, his wife, as sellers, and on a supplemental contract, dated March 3, 1927, between the same parties, and the plaintiffs.

It is also alleged that since the said contracts were signed by the several parties, and prior to the filing of this suit

On appeal of William F. Smith,
 Defendant,
 vs.
 William F. Smith and John F. Smith,
 (Plaintiffs),
 Justice F. W. Smith, District Court,
 St. Louis, Mo.

233 I.A. 624

NO. 10,000. This case was heard on the 10th day of January, 1937, at St. Louis, Missouri. The court was composed of the Honorable Judge F. W. Smith, District Court, St. Louis, Mo. The parties present were William F. Smith, Defendant, and John F. Smith and William F. Smith, Plaintiffs. The case was heard on the merits. The court found in favor of the Defendant, William F. Smith, and awarded him the sum of \$10,000, with interest thereon from the date of the filing of the complaint to the date of the judgment. The court also awarded the Defendant his costs. The court's decision was affirmed on appeal.

by the plaintiffs, two of the parties to said contracts have died; namely, Louise K. Pratt and Nick M. Ellis. This allegation as to the death of these two parties to said contracts is admitted by the respective answers of the defendants.

The first contract states the purchase price to be \$167,120 to be paid as follows: \$18,500 as earnest money at the time of the signing of the contract on August 26, 1926, a further sum of \$36,500 on or before March 1, 1927, and the \$112,120 balance on or before March 1, 1932 to be secured by trust deed and notes. The \$18,500 earnest money is all that was paid under the contract.

Thereafter on March 3, 1927, the second contract, described in the complaint as an amendment to the first contract and again as an amended or supplemental contract, was entered into, and by its terms the time for the payments as to the balance was extended. An additional \$1,000 was then paid, and the time for paying \$35,500 was extended to on or before March 1, 1928, on which date, notes totalling \$112,120 payable on or before five years thereafter, secured by trust deed were to be made and delivered by the prospective purchasers.

The \$35,500 was never paid and the notes and trust deed were never made or delivered and it is so alleged in the complaint.

The original contract contains the following provision with reference to commissions, if any are to be paid:

"It is further agreed between the parties hereto and with the co-partnership of Joseph F. Ryan and H. Edw. Linden, real estate brokers, that they shall receive 5% of the total consideration of this contract, and that said 5% real estate commission shall be paid out of the notes given by the purchasers to the sellers secured by a mortgage or a trust deed, as hereinabove provided, and that said Joseph F. Ryan and H. Edw. Linden shall take said notes without recourse to the sellers."

Said provision is also repeated in the second or supplemental contract with the following addition:

"And said parties of the third part (plaintiffs) join in execution of this agreement for the purpose of consenting to the extension herein provided for and do hereby agree to take notes as extended by the terms hereof in full payment of their commission."

It is further alleged in the complaint:

"That plaintiffs, in and by said contracts, agreed to accept as their real estate brokers' commission, said sum of five per cent of the sale price, in notes of the purchasers secured by said trust deed or mortgage upon the real estate sold, that is to say, plaintiffs agreed to accept their commissions in trust deed notes out of the balance of the purchase price which was to be paid by the purchasers to the sellers."

It is also alleged in the complaint that the defendant Frank B. Pratt entered into an agreement with the defendant William S. Barbee and Nick M. Ellis "fraudulently and with malicious intent to defraud the plaintiffs herein out of the collection of their brokers' commission by relieving said purchasers from the making of any notes and trust deed."

The defendant Barbee filed an answer wherein he denied any liability for the commissions claimed by the plaintiffs and denied the charge of fraud alleged in the complaint. He admitted by said answer that he entered into the contracts and admitted that he never executed the trust deed and notes. He also admitted the allegation that the plaintiff Ryan is a resident of Elgin, Illinois, that the plaintiff Linden is a resident of Chicago, Illinois, and that he himself is a resident of Chicago, Illinois, but denied that the defendant Pratt is a resident of Elgin, Illinois, alleging in said answer that Pratt is a resident of Wayne, DuPage County, Illinois.

The defendant Pratt appeared specially and moved to quash the service of summons and to question the jurisdiction of the court. This motion was denied, and thereafter, under his special appearance, he filed an answer which was later amended by leave of court. By said amended answer Pratt denied that plaintiffs are entitled to

any commissions; denied that plaintiffs found a purchaser ready, able and willing to purchase the property; denied that Barbee and Ellis, named in the contracts as purchasers, paid the \$35,500 and denied that they executed or delivered their notes and trust deed for \$112,120; denied the allegations of fraud stated in the complaint or that he conspired with Barbee and Ellis to deprive and prevent the plaintiffs from collecting any supposed commissions, and denied that his deceased wife was guilty of any wrongful act which tended to prevent the plaintiffs from collecting any supposed commissions; and denied that he is indebted to the plaintiffs in the sum of \$8,056 or any other sum of money.

Pratt's amended answer admits that the parties entered into the original contract and the supplemental contract; admits that the \$12,500 earnest money was paid by Barbee and Ellis, and later an additional \$1,000 at the time the supplemental contract was entered into by the parties; admits that the contracts contain provisions that plaintiffs agreed to accept commissions in trust deed notes out of the balance of the purchase price; admits that Barbee and Ellis never executed or delivered their trust deed and notes for the \$112,120 balance as alleged in the complaint; admits that Barbee and Ellis brought suit against this defendant and his deceased wife, and the plaintiffs in this suit, and that he, Pratt, made a settlement with the said Barbee and Ellis, and thereafter said suit was dismissed; and admits that he and the plaintiff Ryan are not residents of Cook County, Illinois, and that the defendant Barbee is a resident of Cook County, Illinois, but denies that the plaintiff Linden is a resident of Cook County, Illinois.

In addition to said denials and admissions contained in said amended answer, it is charged that Barbee and Ellis defaulted in the terms and provisions of said contracts and that by reason of

[illegible][illegible]

in the form of a handwritten note to the effect that the above information was obtained from the files of the Department of the Interior, Bureau of Land Management, and was not to be used for any other purpose.

their failure to perform their part of the said contracts they forfeited to Pratt and Louise K. Pratt, his wife, the \$19,500 which had been paid; that by reason of the default on the part of said Barbee and Ellis, this defendant sustained irreparable loss because he was prohibited and prevented, by virtue of said contracts, from selling the property to other prospective purchasers. It is further charged in said amended answer that the suit filed by Barbee and Ellis, against the plaintiffs and this defendant and his wife, was never brought to trial by any of the defendants to said suit, although it had been pending for a number of years in the Circuit Court of Du Page County at Wheaton, Illinois, before it was finally dismissed; that the pendency of said suit for a number of years operated as a cloud upon the title to the property and Pratt was about to lose his property because he was unable to procure a loan thereon, and so he made a settlement with Barbee and Ellis in order to procure a dismissal of said suit, which dismissal was not prejudicial to Ryan and Linden in any manner. It is further charged in said amended answer that Ryan and Linden filed their claim against the estate of Louise K. Pratt in the Probate Court of Du Page County at Wheaton, Illinois in the month of July, 1928 and took no further action thereon until January 4, 1936, on which date they withdrew the claim.

It is also charged in said amended answer that Pratt and his wife - now deceased - were at all times ready, able and willing to perform their part of the said contracts and it was through no fault of Pratt and his wife that Barbee and Ellis failed to execute and deliver the notes and trust deed mortgage as required by the terms of the contracts.

Plaintiffs filed a reply to Pratt's amended answer, alleging that by agreement between Barbee and Ellis on the one hand, and Pratt and his wife on the other hand and by the payment of

[illegible]

\$1,000 to Barbee and Ellis the contracts were terminated and that they were released from making said notes and trust deed, and that thereby the contracts were not forfeited but terminated.

It is further alleged in said reply that it became the duty of Pratt and his wife to file a bill for specific performance and that there was no obligation on the part of Ryan and Linden to advance the costs of the guaranty policy.

It is again alleged in said reply, as in the complaint, that Pratt surreptitiously and fraudulently released Barbee and Ellis from their obligation to execute and deliver the notes and trust deed.

It appears from the pleadings of all the parties to this suit that it is admitted that Barbee and Ellis never paid the \$35,500 and never executed or delivered the trust deed and their notes aggregating \$112,120 as required by the terms of the contracts.

That Ryan and Linden, the plaintiffs, were defendants in the suit filed in the Circuit Court of Du Page County, Illinois, and filed an answer to the charge made by Barbee and Ellis in their complaint that there was fraud and misrepresentation in connection with the making of the contracts sued upon therein, and it is also admitted by the pleadings that said suit so instituted in Du Page County by Barbee and Ellis was pending in said court for a number of years before it was dismissed.

That the plaintiffs herein, Ryan and Linden filed in the Probate Court of Du Page County, their claim for commissions against the estate of Louise K. Pratt, deceased, and permitted said claim to remain, without prosecuting the same, from the time it was filed in July, 1928, until January 4, 1936, and on which date they withdrew said claim. It is also admitted by the pleadings that Barbee is a resident of Cook County and that the defendant Pratt is not a resident of Cook County.

1,000 to 1,500 and this was the amount of the...
they were released from their...
thereby the...
It is further...
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and that there...
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The evidence, which was offered before the court without a jury, shows that Ryan testified he resided in Elgin, Illinois and that in 1926 he was in the real estate brokerage business, and a licensed real estate broker in Wisconsin; that he was first licensed as a real estate broker in Illinois in 1928, and that he had no Illinois license in 1926; that he first learned of the dismissal of the suit which Barbee and Ellis filed in the Circuit Court of Du Page County several months after it was dismissed; that he was to furnish the guaranty policy and that he did not pay for it personally; that he first came to Illinois to engage in the real estate business in 1928, and that between 1926 and 1928 he operated in Wisconsin.

Linden testified he resided in Chicago, and in 1926 was in the real estate business; that he knew Ryan at the time, and that he, Linden, had some dealings with Pratt.

According to the terms of the contract, the subject of this litigation, payment of \$35,500 was due on March 1, 1928, from the purchasers, but was not made, and in addition, they defaulted in the execution of notes for \$112,130, to be secured by trust deed, and such default was not cured by subsequent payment.

From the plaintiffs' standpoint in this action, the important question concerns the provision for payment to them of a real estate broker's commission. The contract provides that the plaintiffs as real estate brokers are to receive five per cent of the total consideration of the contract, to be paid in notes given by the purchasers to the sellers, secured by a trust deed. This event never took place, so the question arises is there anything in the record which would justify the allowance of the amount of the judgment entered by the trial court after hearing the evidence offered in support of plaintiffs' claim.

It must be admitted that the purchasers of this property were in default on March 1, 1928; that the default continued, and

[illegible]

under the terms of the contract the defendants were entitled to retain the \$18,500, which was paid as earnest money at the time the contract was executed on August 26, 1926, as liquidated damages. This is provided for in the contract as follows:

"Should the purchasers default in the performance of this contract on their part in the time and in the manner specified, then at the sellers' option the earnest money shall be forfeited as liquidated damages and this contract shall thereupon become null and void. In case of cancellation or termination of this contract, except for default on the purchasers' part said earnest money shall be refunded to the purchasers."

The plaintiffs allege in their complaint that it became the duty of the defendant Frank B. Pratt and his wife to bring suit for specific performance of said contract for the protection of the plaintiffs as well as themselves, which they failed to do.

From an examination of the contract there is no provision that the defendant shall institute a suit for specific performance in order to compel the purchasers of the property to perform. Of course Pratt had the right to file a suit of the character mentioned, but, under the contract, he had the right to retain the earnest money as liquidated damages. The contract provides that all parties are bound by the terms of the contract, and "that time is the essence of this contract and of each and every of the covenants and agreements herein contained, and that all the covenants and agreements herein contained, shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties."

This court in Ash v. Oppman, 199 Ill. App. 573, (Abst. Dec.) Syllabus 4, held:

"Where a purchaser of land defaults in performance of the contract the vendor may bring an action for specific performance of the contract, or a suit for damages, or he may accept the act as a forfeiture of the contract."

and that opinion was cited with approval in the case of Amies v. Wesnofske, 255 N. Y. 156, where the court said:

"It has been very generally held that a vendor is under no duty to his broker to enforce specific performance by the vendee, when commissions are conditioned upon performance; that the vendor may accept forfeiture by the vendee, retain the down payment made, and not become liable thereby to pay his broker. (Ash v. Oppman, 193 Ill. App. 573; Sams v. Olympia Holding Co., 153 Wash. 254); McPhail v. Buell, 87 Cal. 115; Dunne v. Colomb, 193 Cal. 740; Laird v. Elliott, 219 S. W. Rep. 499 (Tex.); Norris v. Walsh, 71 Col. 185; Simon v. Myers, 284 Penn. St. 3; Seymour v. St. Luke's Hospital, 28 App. Div. 119. * * *

In this instance, on the day fixed for the closing of title, as postponed by mutual agreement, the vendees declined to proceed with performance. The forfeiture, unequivocally declared by the vendees, was accepted by the vendors. True, the parties entered into a new agreement whereby the vendors were to retain the \$10,000 previously paid and the vendees were to be released from their contract obligations. However, the vendors received from the agreement no right or thing which the law had not already given them, viz., the sum of \$10,000 and the right to retain it. The defendants, therefore, neither prevented nor hindered performance. Non-performance was already, without their aid, an established fact. Passive acquiescence in a declared default and its consequences was not an act of prevention or hindrance. Neither did the defendants receive an additional advantage, bargained for in lieu of non-performance. Consequently a case of waiver was not made out. The condition upon which payment was made to depend, not having been performed or waived, no recovery may be had."

To the same effect is the case of Van Norman v. Fitchette, 100 Minn. 145, 110 N. W. 851.

On the question of payment of this real estate commission to the plaintiff, the contract provides:

"Said contract of August 28, 1926, further provided that the parties of the third part (plaintiffs) shall receive five per cent of the total consideration of said contract as a real estate brokers' commission, which commission shall be paid in notes given by the parties of the first part to the parties of the second part, and secured by the mortgage or trust deed as therein provided, and that said parties of the third part will take said notes without recourse to the parties of the second part, * * *"

It is clear that defendant Pratt was not in default. Default in execution and performance of the contract was by the purchasers Barbee and Ellis, and for that reason the notes to be secured by trust deed were never executed, so that the defendant Pratt was not in a position to perform in the payment of a brokerage commission to the plaintiffs in this action by delivery of promissory notes for that purpose.

The plaintiffs contend that the vendors and the purchasers got together and cancelled the contract for a consideration of \$1,000 paid by the vendors to the purchasers, evidently to compensate them to some extent for the \$19,500 which they had paid to the vendors; that this was done without the knowledge or consent of the brokers. It is clear from the record that the contract was in default and the defendant Pratt was entitled to retain the amount of earnest money as liquidated damages.

The settlement of the Barbee and Ellis suit against defendant Pratt was not a waiver of the default that had taken place some time before; on the contrary, from this litigation it appears that the purchasers of the property were not ready to perform; that the settlement of the suit was for the purpose of clearing title so that defendant Pratt could execute notes secured by a trust deed upon the property in question. There being no performance of the contract, the plaintiffs are not in a position to recover the amount claimed as commissions, for the reason that the notes which were to be executed by the purchasers were to be in part payment of the brokers' commissions.

The law is well settled that before a broker can recover commissions provided for in the contract, the contract must be performed in the manner specified as to how and when the commissions are to be paid. The law upon this subject is plain.

Upon a like question, in Matteson v. Walker, 249 Ill. App. 404, the contract provided:

"If the deal falls through and the sale is not made whatever the reason may be, Mr. Walker will pay no commission."

In Hallard v. Shea, 121 Ill. App. 135, the broker was to receive his commission "when said sale is fully carried out."

To a like effect is the case of Orner v. Liner, 238 Ill. App. 348, where the contract provided that the broker was to receive his commissions "when the sale was consummated."

In these cases no recovery could be had until the terms of the contract were performed, which would justify the payment of the commissions to the real estate broker.

In order for the plaintiffs to be entitled to their commissions under the terms of this particular contract, performance was necessary, and a default having taken place, the defendant is not liable. This in a measure is sustained in the case of Savage v. Stewart, 226 Ill. App. 388, where the court said:

"In order for him to be entitled to any amount over \$25,000 it was necessary that he produce a purchaser who purchased the land as provided in the option, and that the trade be completed in all respects or that he produce a purchaser who was ready, able and willing to purchase at a price in excess of \$25,000. Burnett v. Potts, 236 Ill. 499; Kaull v. Pasfield, 230 Ill. App. 1."

Other questions have been called to our attention by defendant Pratt who filed a special and limited appearance for the purpose of moving the court to quash the summons and to question the jurisdiction of the court, on the ground that he is not a resident of Cook County, Illinois, but it will not be necessary to pass upon them in view of our conclusion that there was no performance of the contract such as would justify the recovery of commissions claimed to be due the plaintiffs.

Since the filing of the appeal Frank B. Pratt has died and George R. Pratt, Administrator of the Estate of Frank B. Pratt has been substituted for him in this case.

We conclude that the court erred in entering judgment for the plaintiffs, and it is reversed.

JUDGMENT REVERSED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

40261

H. J. MEYER,

Appellant,

v.

GEORGE KRUG,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

298 I.A. 625¹

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff brings this appeal from a judgment entered on March 14, 1938, in the Municipal Court for \$86.22 against defendant as damages sustained by plaintiff because of moneys advanced to the use of defendant by plaintiff.

The defendant George Krug was an excavator and the plaintiff H. J. Meyer was an insurance agent or broker. Meyer claims that Krug owes him \$2,992.37 for insurance premiums. The defendant admits that he owes plaintiff for the amount for which judgment was entered, but as to the other amount, he claims that the allegation is untrue.

In support of defendant's claim there was introduced in evidence plaintiff's letter of October 21, 1935, to defendant, which reads as follows:

"Employers Liability Assurance Corp. of London
175 W. Jackson Blvd., Chicago, Illinois

October 21, 1935.

Mr. George Krug,
7301 Prairie Ave.
Chicago, Illinois

Dear Sir:

Re: Account

According to my records there is a balance of \$136.22 outstanding in your account which is now past due. I shall appreciate your sending me your check in this amount without further delay. Your prompt attention to this matter will be appreciated.

Yours very truly,
H. J. Meyer."

The evidence shows that thereafter the defendant endorsed a check for \$50.00 which he turned over to plaintiff to apply on the account, leaving a balance of \$86.22, which is the amount of the judgment entered in this case.

40361

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

2. *Phyllanthus*

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• *Chlorophyll a* (Chl a) is the primary photosynthetic pigment in most plants and algae. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum. Chl a is essential for the light-dependent reactions of photosynthesis, where it converts light energy into chemical energy in the form of ATP and NADPH.

1217

INDEX

THE UNIVERSITY OF CHICAGO PRESS

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

March 14, 1944

... ..

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[Faint, illegible text]

1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 2688-2689, 2690-2691, 2692-2693, 2694-2695, 2696-2697, 2698-2699, 2700-2701, 2702-2703, 2704-2705, 2706-2707, 2708-2709, 2710-2711, 2712-2713, 2714-2715, 2716-2717, 2718-2719, 2720-2721, 2722-2723, 27

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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1. 1944. 2. 1945. 3. 1946. 4. 1947. 5. 1948. 6. 1949. 7. 1950. 8. 1951. 9. 1952. 10. 1953. 11. 1954. 12. 1955. 13. 1956. 14. 1957. 15. 1958. 16. 1959. 17. 1960. 18. 1961. 19. 1962. 20. 1963. 21. 1964. 22. 1965. 23. 1966. 24. 1967. 25. 1968. 26. 1969. 27. 1970. 28. 1971. 29. 1972. 30. 1973. 31. 1974. 32. 1975. 33. 1976. 34. 1977. 35. 1978. 36. 1979. 37. 1980. 38. 1981. 39. 1982. 40. 1983. 41. 1984. 42. 1985. 43. 1986. 44. 1987. 45. 1988. 46. 1989. 47. 1990. 48. 1991. 49. 1992. 50. 1993. 51. 1994. 52. 1995. 53. 1996. 54. 1997. 55. 1998. 56. 1999. 57. 2000. 58. 2001. 59. 2002. 60. 2003. 61. 2004. 62. 2005. 63. 2006. 64. 2007. 65. 2008. 66. 2009. 67. 2010. 68. 2011. 69. 2012. 70. 2013. 71. 2014. 72. 2015. 73. 2016. 74. 2017. 75. 2018. 76. 2019. 77. 2020. 78. 2021. 79. 2022. 80. 2023. 81. 2024. 82. 2025. 83. 2026. 84. 2027. 85. 2028. 86. 2029. 87. 2030. 88. 2031. 89. 2032. 90. 2033. 91. 2034. 92. 2035. 93. 2036. 94. 2037. 95. 2038. 96. 2039. 97. 2040. 98. 2041. 99. 2042. 100. 2043. 101. 2044. 102. 2045. 103. 2046. 104. 2047. 105. 2048. 106. 2049. 107. 2050. 108. 2051. 109. 2052. 110. 2053. 111. 2054. 112. 2055. 113. 2056. 114. 2057. 115. 2058. 116. 2059. 117. 2060. 118. 2061. 119. 2062. 120. 2063. 121. 2064. 122. 2065. 123. 2066. 124. 2067. 125. 2068. 126. 2069. 127. 2070. 128. 2071. 129. 2072. 130. 2073. 131. 2074. 132. 2075. 133. 2076. 134. 2077. 135. 2078. 136. 2079. 137. 2080. 138. 2081. 139. 2082. 140. 2083. 141. 2084. 142. 2085. 143. 2086. 144. 2087. 145. 2088. 146. 2089. 147. 2090. 148. 2091. 149. 2092. 150. 2093. 151. 2094. 152. 2095. 153. 2096. 154. 2097. 155. 2098. 156. 2099. 157. 2100. 158. 2101. 159. 2102. 160. 2103. 161. 2104. 162. 2105. 163. 2106. 164. 2107. 165. 2108. 166. 2109. 167. 2110. 168. 2111. 169. 2112. 170. 2113. 171. 2114. 172. 2115. 173. 2116. 174. 2117. 175. 2118. 176. 2119. 177. 2120. 178. 2121. 179. 2122. 180. 2123. 181. 2124. 182. 2125. 183. 2126. 184. 2127. 185. 2128. 186. 2129. 187. 2130. 188. 2131. 189. 2132. 190. 2133. 191. 2134. 192. 2135. 193. 2136. 194. 2137. 195. 2138. 196. 2139. 197. 2140. 198. 2141. 199. 2142. 200. 2143. 201. 2144. 202. 2145. 203. 2146. 204. 2147. 205. 2148. 206. 2149. 207. 2150. 208. 2151. 209. 2152. 210. 2153. 211. 2154. 212. 2155. 213. 2156. 214. 2157. 215. 2158. 216. 2159. 217. 2160. 218. 2161. 219. 2162. 220. 2163. 221. 2164. 222. 2165. 223. 2166. 224. 2167. 225. 2168. 226. 2169. 227. 2170. 228. 2171. 229. 2172. 230. 2173. 231. 2174. 232. 2175. 233. 2176. 234. 2177. 235. 2178. 236. 2179. 237. 2180. 238. 2181. 239. 2182. 240. 2183. 241. 2184. 242. 2185. 243. 2186. 244. 2187. 245. 2188. 246. 2189. 247. 2190. 248. 2191. 249. 2192. 250. 2193. 251. 2194. 252. 2195. 253. 2196. 254. 2197. 255. 2198. 256. 2199. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 5

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10. The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the City of New York, for the year 1911:

[Faint handwritten notes at the bottom of the page]

• 55 • ७ ५०७ • 18

1717 1087

018079

[Faint handwritten notes]

... ..

1968-1969

1955-1956

Yours truly,

11. 12. 13.

[illegible]

...and the ...

Plaintiff claims that many policies were obtained for which the defendant has not paid; also, that during the trial several errors were committed by the trial judge.

Letters and statements of account which plaintiff sent to the defendant were not admitted in evidence because the plaintiff could not show the mailing of the letters from plaintiff to defendant. It was shown by the evidence that two office boys in the office of the insurance company had charge of the mailing of letters and that some of the letters which plaintiff claims to have sent to defendant were put in a pile of letters to be mailed by these boys.

Plaintiff further contends that having proved a custom as to the method of mailing letters from that office, proof of that custom would raise a presumption that the letters were mailed and received by the defendant. We cannot find that the law has gone that far. If the testimony shows a letter was mailed, the presumption is that the defendant received it and it puts upon such defendant the burden of refuting that allegation, but we do not find that any presumption arises from a custom which would authorize the admission of secondary evidence as to the contents of letters supposedly received which, it is claimed, the law would hold had been received because of the proof of the custom. However, one of the office boys, called as a witness, testified as to the time when he did this work, mailing letters, but he did not cover the period during which some of the letters involved in this case were sent. After testifying as to his duties in said office, he left the witness stand. Thereafter plaintiff requested that he be recalled and permitted to change the dates in his former testimony. This the court refused to do. Plaintiff claims in this the court committed error.

A trial judge sitting without a jury is in a better position to determine, at his discretion, as to whether a witness

It is not to be understood that any letter was received from

which the Government was not aware; and, in fact, the State

several others were admitted by the State House.

Letters and statements of persons who are in the habit of

to the Government were not admitted in evidence because they are

could not show the writing of the letters from a person to a person.

It was shown by the evidence that the letters were in the office of

the absence of any other person of the writing of letters and that

some of the letters were admitted in evidence in the State House.

were put in a file of letters as he called by the State House.

It is not to be understood that the letters were received by

to the effect of writing letters from the State House, and that

custom would not be a presumption that the letters were written and

received by the Government. It is not to be understood that the

that fact. It was necessary to show a letter was written, the presumption

is that the Government received it and it was not to be understood that

burden of refusing the evidence, but it was not to be understood

presumption arises from a custom which would be a presumption that the

of a custom which would be a presumption that the letters were written

received when, it is shown, the letters were not received

because of the fact of the custom. However, it is not to be understood

called as a presumption, but it is not to be understood that the letters

were written, and it is not to be understood that the letters were

of the letters received in this State House. It is not to be understood

as to his action in this matter, but it is not to be understood that

after a letter is received that it is to be understood that the letters

the date is not to be understood. It is not to be understood that

It is not to be understood that the letters were received by

It is not to be understood that the letters were received by

position is not to be understood. It is not to be understood that

should be permitted to change his testimony. The trial judge in refusing to do this did not commit prejudicial error.

It is next contended by plaintiff that the finding of the court was contrary to the weight of the evidence. With this we cannot agree. The trial judge having seen the witnesses and having heard them testify was in a better position to judge as to the weight of the evidence than is a court of review.

As was said in Eckart v. City of Belleville, 294 Ill. App. 144, it was said:

"Where case was heard before chancellor, presumption was that he decided on proper evidence, and consequently where there was sufficient evidence to justify his finding, judgment based thereon would not be reversed."

We cannot say from a review of this case that the trial court did other than render a fair judgment on the evidence presented, and for the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HERBEL, J. CONCUR.

should be permitted to examine the evidence. The trial judge is
refusing to do this and is committing a reversible error.
It is next contended by plaintiffs that the trial judge
cannot hear testimony from the witness. This is not so.
The trial judge having seen the witness and having
heard their testimony was in a better position to judge as to the weight
of the evidence than is a court of review.
It was said in Smith v. Smith, 100 Cal. 100, 101, 34 P. 2d 100, 101.

1st, it was said:

"Where error was found before a trial judge, the appellate court
must be satisfied as to the propriety of the error, and if it is
not satisfied it must reverse the judgment. The appellate court
thereon should not be reversed."

It cannot be said that the trial judge is in a better position to judge as to the weight of the evidence than is a court of review. It is held in the Smith case, and for the reasons therein given the judgment of the trial judge is affirmed.

Reversed.

Reversed, 100 Cal. 100, 101, 34 P. 2d 100, 101.

39924

OSCAR A. RATHER,
Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

24
APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

298 I.A. 625²

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On a trial before a jury in an action for damages on account of personal injuries suffered, a verdict was returned in favor of plaintiff in the sum of \$7,000. Defendant's motions for a directed verdict and for a new trial were overruled and judgment was entered on the verdict.

On October 15, 1935, plaintiff, who was then fifty-eight years of age, arrived in Chicago at the Chicago & North Western depot at about 7 a.m. He came from Neenah, Wisconsin, where he had attended a funeral and was on his way to his home, at 7124 Bernett avenue. He engaged a Yellow cab to take him to the Illinois Central suburban station at Randolph street. The driver proceeded to Wacker drive and Lake street, entered the lower level of Wacker drive and drove east in the lower level of Wacker drive, intending to turn south in the lower level of Michigan boulevard in order to let plaintiff off at the suburban station. Plaintiff testified that the cab was traveling at a moderate rate of speed; that the street on the lower drive was rather bumpy; that he did not know why the driver took the lower drive; that "all of a sudden we hit a bump and I went straight up in the car and when I came down on the seat^I * * * fell over on my side;" that he could not straighten up on the seat; that he lay on his side; that the driver stopped and asked him whether he was hurt; that he finally straightened up and the cab proceeded to

33324

ORGAN & BROTHERS,
Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

STATE OF ILLINOIS
COURT OF COMMON PLEAS

2931 A. 635

MR. JUSTICE TUCKER, delivered the opinion of the court.

On a trial before a jury in an action for damages on account of personal injuries suffered, a verdict was returned in favor of plaintiff in the sum of \$7,000. Defendant's motion for a directed verdict and for a new trial were overruled and judgment was entered on the verdict.

On October 15, 1935, plaintiff, who was then fifty-one years of age, arrived in Chicago at the Chicago & North Western depot at about 7 a.m. He came from Wausau, Wisconsin, where he had attended a funeral and was on his way to his home at 4134 Bennett avenue. He engaged a Yellow cab to take him to the Illinois Central suburban station at Randolph street. The driver proceeded to Jackson drive and Lake street, entered the lower level of Jackson drive and drove east in the lower level of Jackson drive, intending to turn south in the lower level of Michigan boulevard in order to let plaintiff off at the suburban station. Plaintiff testified that the cab was traveling at a moderate rate of speed; that the street on the lower drive was rather bumpy; that he did not know why the driver took the lower drive; that "all of a sudden we hit a bump and I went straight up in the air and when I came down on the seat" * * * fell over on my side; "that he could not straighten up on the seat; that he lay on his side; that the driver stopped and asked him whether he was hurt; that he finally straightened up and the cab proceeded to

the station; that at the time he did not know anything about any holes or other obstructions in the street along which the cab was proceeding; that when the car struck the bump he went up in the air high enough so that his hat was crushed and a slight wound was inflicted on the top of his scalp; that "the bump was very severe;" that at the station the driver offered to assist him out of the cab and picked up his overnight bag and took it out; that he paid the driver, picked up his overnight bag and boarded the suburban train; that "I felt broken in two. If I would stand still I did not have any pain, but the minute that I would try to move either way there would be sharp shooting pains;" that he got off the train at Jeffery avenue and walked to his home at 7124 Bennett avenue, where he lay down on the couch; that in fifteen or twenty minutes Dr. Arthur C. Kleutgen was called and he arrived between 10 and 11 o'clock; that he observed plaintiff on the couch; that he informed plaintiff that he would have to go to his (Dr. Kleutgen's) office in order to take X-rays; that plaintiff and his wife proceeded there in a cab; that X-rays were taken by Dr. Royer, who had an office adjoining that of Dr. Kleutgen; that after examining the X-rays Dr. Kleutgen ordered plaintiff to bed; that he went home in a cab and was given the choice of putting on a plaster of Paris cast or trying to lie perfectly quiet on a rubber air cushion; that it was decided to use an inflated air cushion; that the air cushion was placed; that he remained in that prostrate position from October 15 to November 19, 1935; that Dr. Kleutgen called daily; that he had a registered nurse in attendance on him for twenty-four hours a day during two weeks, and for eight hours a day for another two weeks; that thereafter his wife performed whatever nursing service was needed; that he didn't move at all until November 19; that on the latter day he had a steel brace fitted to him with "two steel protections running down each side of the spine

him with "two steel protections running down each side of the spine November 1st; that on the latter day he had a steel brace fitted so whatever nursing service was needed; that he didn't move at all until hours a day for another two weeks; that thereafter his wife performed on him for twenty-four hours a day during two weeks; and for at least Kiensten called daily; that he had a regular nurse in attendance prostrate position from October 1st to November 1st, 1934; that Dr. cushion; that the air cushion was placed; that he remained in that on a rubber air cushion; that it was decided to use an inflated air of putting on a plaster of Paris cast or trying to lift the patient's feet Plaintiff to bed; that he went home in a cab and was given the choice Dr. Kiensten; that after examining the X-rays Dr. Kiensten ordered X-rays were taken by Dr. Meyer, who had an office adjoining that of X-rays; that Plaintiff and his wife proceeded there in a cab; that he would have to go to his (Dr. Kiensten's) office in order to make he observed Plaintiff on the couch; that he informed Plaintiff that Kiensten was called and he arrived between 10 and 11 o'clock; that down on the couch; that in fifteen or twenty minutes Dr. Kiensten 1. Avenue and walked to his home at 1334 Bennett Avenue, where he lay would be sharp shooting pains; that he got off the train at Jersey any pain, but the minute that I would try to move either way there that "I felt broken in two. If I would stand still I did not have driver, picked up his overnight bag and boarded the suburban train; and picked up his overnight bag and took it out; that he held the that at the station the driver offered to see that him out of the cab afflicted on the top of his scalp; that "the bump was very severe;" high enough so that his hat was crushed and a slight wound was inflicted; that when the car struck the bump he went up in the air holes or other obstructions in the street along which the cab was the station; that at the time he did not know anything about any

full length from the shoulder down to the hips and it also had a steel member running around, catching each hip on the side, and the shoulder straps;" that he wore the steel brace "continually whenever I was on my feet from the 19th of November until the 18th of January, 1936. On the 18th of January, 1936, I used an abdominal belt to protect the small of my back;" that at the time of the trial he was still wearing the abdominal belt; that the belt "acts as a brace whenever I go to lift any object or sample case. When I got on my feet I found that I was very weak. I found that the weakness was in my back and that I had to be very, very careful in getting in and out of a car and in bending over at any time;" that prior to the time of the accident, aside from his business, the general nature of his activities had been playing golf, bowling and fishing; that since the accident "I have done neither of these things. I do not feel able to do so. I do not carry the amount that I previously did because it tires me too much. There is a weakness that I have not overcome in my condition that was not present prior to the time that the accident occurred. It manifests itself in reference to picking up any kind of weight, or lifting, walking, sitting or standing. I mean that if I was to stand on the street corner talking to anyone for 15 or 20 minutes, my back begins to ache and I want to sit down, and if I go to a movie and sit down any length of time, I get that same back soreness and I want to stand up. It seems to come up at those times. There is a weakness there that don't seem to be overcome. I never had anything of that sort prior to the time that I was injured in this accident."

It appears that for the sum of \$1,500 plaintiff executed a covenant not to sue the Yellow Cab Company, and that he also received \$1,500 by virtue of being covered by an accident insurance policy. On objection of counsel for defendant the court struck out the reference to the accident insurance.

full length from the shoulder down to the hips and it also had a steel member running across, catching under the hip on the side, and the shoulder straps; that he wore the steel brace "continuously" whenever I was on my feet from the 1st of November until the 12th of January, 1936. On the 12th of January, 1936, I used an abdominal belt to protect the small of my back; that at the time of the trial he was still wearing the abdominal belt; that the belt "costs as a piece whenever I go to lift any object or handle one. When I got on my feet I found that I was very weak. I found that the weakness was in my back and that I had to be very, very careful in getting in and out of a car and in bending over at any time; that prior to the time of the accident, aside from his business, the general nature of his activities had been playing golf, bowling and fishing; that since the accident "I have done neither of those things. I do not feel able to do so. I do not carry the amount that I previously did because it tires me too much. There is a weakness that I have not overcome in my condition that was not present prior to the time that the accident occurred. It manifests itself in reference to picking up any kind of weight, or lifting, walking, sitting or standing. I mean that if I was to stand on the street corner waiting for anyone for 15 or 20 minutes, my back begins to ache and I want to sit down, and if I go to a movie and sit down any length of time, I get that same back soreness and I want to stand up. It seems to come up at those times. There is a weakness there that has not been to be overcome. I never had anything of that sort prior to the time that I was injured in this accident."

It appears that for the sum of \$1,500, plaintiff executed a covenant not to sue the Yellow Cab Company, and that he also received \$1,500 by virtue of being covered by an accident insurance policy. On objection of counsel for defendant, the court struck out the reference to the accident insurance.

It also appears that it was necessary for plaintiff to hire a man to drive his car and handle his grips, and the driver continued in his service until May 1, 1936; that his earnings from his employment were \$100 per week; that he did not receive anything from his employer until he returned to his work in January; that he would be sixty years of age on July 31, 1937; that his back had not improved in the previous twelve months "with reference to its condition in so far as its weakness is concerned and my ability to do things is concerned;" that "I carry the regular grip which I must carry consisting of catalogs, order blanks, etc., which weigh about 25 pounds and I am supposed to carry other samples, another grip with other samples and now I eliminate that to a big extent for the reason that I cannot handle it. I haven't done any outdoor activities since the accident. Prior to the accident I bowled about once a week. I have not bowled since that time. I went out golfing on an average of about once a week. I have not used a golf club since this accident. I have not done any fishing since this accident. I usually took a fishing trip once a year for trout. I have not done any physical work or taken any exercise of any kind since this accident other than what I do in the routine of my occupation." On cross-examination he stated that he was not sure whether the cab hit the bump at Dearborn street or State street and the lower drive; that he was thrown forcibly up against the top of the car and came down with "great force;" that the overnight bag contained only a few overnight articles and was light; that he landed on his left side; that he immediately complained to the driver; that he got out of the cab unassisted and walked to the train; that he carried his overnight bag from the depot at Jeffery avenue to his home, one and one-half blocks away; that his wife saw he "was pale as a sheet;" that when the doctor came he was lying on his back on the couch in the living room; that the doctor pulled up a

It also appears that it was necessary for him to hire a man to drive his car and handle his traps, and the driver continued in his services until May 1, 1936; that his earnings from his employment were \$100 per week; that he did not receive anything from his employer until he returned to his work in January; that he would be sixty years of age on July 31, 1937; that his back had not improved in the previous twelve months "with reference to its condition in so far as its business is concerned and my ability to do things is concerned"; that "I carry in regular grip which I must carry consisting of catalogs, order blanks, etc., which weigh about 25 pounds and I am up every day to carry other samples, another grip with other samples and now I estimate that to a big extent for the reason that I cannot handle it. I haven't done any outdoor activities since the accident. Prior to the accident I bowled about once a week. I have not bowled since that time. I went out fishing on an average of about once a week. I have not used a golf club since the accident. I have not done any fishing since the accident. I usually took a fishing trip once a year for trout. I have not done any physical work or taken any exercise of any kind since that time about other than what I do in the routine of my occupation." On cross-examination he stated that he was not sure whether the cab hit the way at Dearborn street or State street and the former driver; that he was forcibly up against the top of the car and came down with "great force"; that the overnight bag contained only a few overnight articles and was light; that he landed on his left side; that he immediately complained to the driver; that he got out of the cab unassisted and walked to the train; that he carried his overnight bag from the depot at Jefferson avenue to his home, one and one-half blocks away; that his wife saw him "was pale as a sheet"; that when the doctor came he was lying on his back on the couch in the living room; that the doctor pulled up a

chair and looked at him and asked him to go to his office; that four X-rays were taken by Dr. Royer; that he was at the two doctors' offices about an hour; that on the evening of October 15 Dr. Kleutgen gave him enemas; that the doctor took a urinalysis every day; that the doctor found blood in the urine on October 16; that he had a swelling; that after making the analyses the doctor gave him enemas; that the doctor also worked to reduce the swelling in the lower intestines; that there seemed to be a lump or an obstruction of some kind that had to be eliminated; that it took the doctor at least a week to get the bowels regulated, which was accomplished through the enemas, and the swelling was reduced; that the condition so far as the lump or swelling was concerned is entirely cleared up; that on January 18 he discarded the metal brace and put on an abdominal web belt ten inches wide, with laces in the back; that "it is used as a regular corset or brace for the small of the back. It is just flat, there are two staves in the back part and there is lacing there. I am still wearing it. I have it on now. I wear it every day. I take it off at night when I go to bed. I did not wear it in bed but removed it every night. I wear it all the time as a protection against bending over and walking or lifting anything. It is a protection in doing lifting. There is a difference between pain and weakness. I don't experience any pain when I have that abdominal belt on. If I make a quick turn I stagger, as when I pick up a grip. On either side, I got overbalanced, which I lay to the weakness in my back. It does not affect my equilibrium. It does not make me dizzy. I do not suffer from vertigo, and that is only when I make a turn on either side, the left or the right. When I reach down to pick up my grip I can't pick it up very easily, I can't bend because I feel a weakness in the back that won't allow it. I don't feel that weakness in the head or in my stomach. It is merely in the back. I have not attempted to play golf since that time. I don't suppose that they are playing

chair and looked at him and asked him to go to his office; that
few days were taken by Dr. Meyer; that he was at the two doctors'
office about an hour; that on the evening of October 15 Dr. Mendenhall
gave him answers; that the doctor took a minute every day; that
the doctor found blood in the urine on October 15; that he had a
swelling; that after this the doctor gave him answers;
that the doctor also worked to reduce the swelling in the lower in-
testines; that there seemed to be a lump or an obstruction of some
kind that had to be eliminated; that it took the doctor at least a
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head or in my stomach. It is merely in the back. I have not attempted
to play golf since that time. I don't suppose that they are playing

golf as yet so I have no occasion to play golf at this time, but I didn't play last summer at all. I had no occasion to play. I have not attempted to bowl nor to fish. My fishing trips that I take are trout fishing trips, which means wading in the streams, and I never feel able to undertake the trip. I cast for trout. I experience pain when I move my arm but you move your body too when you are wading." On redirect the witness stated that at the time of the accident he thought it occurred at the lower level and Dearborn street. On cross-examination he also testified that he feels fairly well when he is quiet, suffers no pain, sleeps fairly well nights. He testified about the amounts expended for the services of physicians, nurses, a man to help him, the X-rays and loss of earnings, all of which amounts appear to be reasonable.

Howard B. Moses, an attorney, testified that he was originally employed by plaintiff, who at that time informed him that the accident occurred at Dearborn street and the lower level of Wacker drive; that such information was given by plaintiff before witness had an opportunity to ascertain from the Yellow Cab Company where the accident occurred, as related by its driver.

Edward Jasinski, a witness for plaintiff, testified that he was a newspaper driver, employed for many years by the Daily Times and before the advent of the Times by the Journal; that prior to October 15, 1935, he traveled over "that lower level passing the intersection of State street in the City of Chicago ever since I worked for the Daily Times. I have worked for the Daily Times since the year 1929. There are several bad spots in there but there was one bad spot in the vicinity of State street that you could not miss, regardless of how you wanted to go through. It was sort of a bowl in the road eighteen or maybe twenty-four inches wide. Part of the pavement was sunk in and part of the bricks were sunk in also, and when it sunk in, it left a protruded edge on the east side of the

Bolt as yet no I have no occasion to play golf at this time, but I didn't play last summer at all. I had no occasion to play. I have not attempted to play now to finish. My friend says that I take care of trout fishing trips, which means fishing in the streams, and I never feel able to undertake the trip. I want for trout. I expect hence pain when I move my arm but you move your body too when you are fishing." On redirect the witness stated that at the time of the accident he thought it occurred at the lower level and between street. On cross-examination he also testified that he feels fairly well when he is quiet, unless no pain, sleeps fairly well nights. He testified about the amount expended for the services of physician, nurses, a man to help him, the -ray and loss of earnings, all of which amounts appear to be reasonable.

Howard D. Mosson, an attorney, testified that he was originally employed by plaintiff, who at that time informed him that the accident occurred at Dearborn street and the lower level ofacker drive; that such information was given by plaintiff before witness had an opportunity to ascertain from the Yellow Cab Company where the accident occurred, as related by its driver.

Edward Jastinski, a witness for plaintiff, testified that he was a newspaper driver, employed for many years by the Daily Times and before the advent of the Times by the Journal; that prior to October 15, 1935, he traveled over "that lower level passing the intersection of State street in the City of Chicago over which I worked for the Daily Times. I have worked for the Daily Times since the year 1926. There are several bad spots in there but there was one bad spot in the vicinity of State street that you could not miss regardless of how you wanted to go through. It is sort of a bowl in the road eighteen or twenty-four inches wide. Part of the pavement was sunk in and part of the bricks were sunk in also, and when it sunk in, it left a protruded edge on the east side of the

bowl that stuck up about one inch, because the first time I hit the bump, I had to pick up five bundles of papers. The first time I hit it, I was covering the driving for the Times and it happened that there was a big parade on Michigan avenue, and I couldn't get on the outer drive, and I went beneath the outer drive and the Illinois Central tracks so I could get to the outer drive, and the fairgrounds, traveling about fifteen to twenty miles an hour when I hit the bumps. That happened in the latter part of the year 1933. I got a jolt; the wheel flew out of my hand and also five bundles of papers flew out of the back of the truck;" that from 1933 until October, 1935, he had to drive around the left side of the road; that it was cleaned up about two or three months ago; that "the drop from the regular line of the pavement down was about 8 or 9 inches. It extended around 24 inches or maybe more across State street. I mean the width of the drop. State street is up above, it does not come through there. All that you know is that State street is above, running on the viaduct. I would say that this depression ran 24 inches or more across State street. * * * This depression runs right across the drive. There is no way you can go without hitting it." On cross-examination the witness testified that he knew it was under State street because as he rode along the lower level he could tell by his knowledge of where the bridges were located.

Joseph Perille, a witness for plaintiff, testified that he was the driver of the Yellow cab on October 15, 1935; that at that time he had been working for the Cab Company for about a year; that he picked up plaintiff at the North Western station; that as he was driving along the lower level of Wacker drive at State street he "kind of hit a little uphill, a hole like, and it was sunk in, and as I kind of straightened out with my cab, I kind of went down another incline and just then I heard my passenger say that he hurt his back. I heard him holler 'Oh, my back.' I turned around and I came to a

bowel that stuck up about as much, because the first time I hit the pump, I had to kick up five hundred of papers. The first time I hit it, I was covering the driving floor with them and it happened that there was a big parade on Michigan Avenue, and I couldn't get on the outer drive, and I went beneath the outer drive and the Illinois Central tracks so I could go to the outer drive, and the fairground, traveling about fifteen to twenty miles an hour. I hit the pump. That happened in the latter part of the year 1933. I got a jolt; the wheel flew out of my hand and the five hundred of papers flew out of the back of the truck; that was 1933 until October, 1935, he had to drive round the left side of the road; that it was cleaned up about two or three months ago; that the drop from the regular line of the pavement down was about 3 or 4 inches. It extended around 25 inches or maybe more below State Street. I mean the width of the drop. It was raised up above, it was not come through there. All that you know is that State Street is above, running on the viaduct. I would say that this depression was 25 inches or more across State Street. I think depression runs right across the drive. There is no way you can go without hitting it. On cross-examination the witness testified that he knew it was under State Street because as he rode along the lower level he could tell by his knowledge of where the bridge were located.

Joseph Kellie, a witness for defendant, testified that he was the driver of the Yellow cab on October 13, 1935; that the first time he had been driving for the Cab Company for about 4 years; that he picked up defendant at the North Branch station; that as he was driving along the lower level of the outer drive at that street he "kind of hit a little bump, a hole like, and it was back to back, and as I kind of staggered out with my cab, I kind of went over another incline and just then I heard my passenger say that he hurt his back. I heard himoller 'Oh, my back'. I turned around and I came to a

slow stop, and I asked him if I could do anything for him, and he says, 'Keep on going to the station.' It was only a few blocks more, and when I got to the station I asked him if I could help him, if I could take him to a doctor, and he said he would manage to get his own doctor. He was in a hurry to get his train. I took him to the Randolph Illinois Central Station, the lower level. When I hit this bump and this depression in the street there, I noticed that I kind of went up and then down, and just as I came down one of the inclines, I went down again and I heard him holler, 'Oh, my back.' I turned around and I seen him, he had his hand back there. * * * The extent of those bumps or depression east and west would run about 20 to 25 feet. * * * It is kind of a bump that you sink in as you come out, to explain it, I am on a level with the cab, and I go down again, and just keep bounding all the time. I couldn't say how deep the depression is, about 4 or 5 inches. You know, you go down and up, and then there is a bigger one. I never measured it;" that the witness "in a couple of days" went back to the scene of the accident with an engineer and pointed out to him the place of the accident; that the engineer made measurements. On cross-examination witness said that he noticed the holes after he hit the first one and slowed down to about eight miles an hour; that he "slowed up right away and just as I slowed up, I went down again on that other incline. I traveled about 15 feet from the time that I hit the first bump before this accident happened."

Charles E. Taylor, on behalf of plaintiff, testified that he was a consulting engineer and that shortly after October 15, 1935, a Yellow cab chauffeur pointed out to him the location of the accident and he made a drawing of such location, which was introduced into evidence, and (speaking about the place where the accident happened) said, "It was not perfectly smooth. In other words, speaking in engineering terms, we had what we call

allow stop, and I started him all I could do to get him to stop, and
 his eyes, 'Keep on going to the station'. It was only a few blocks
 more, and when I got to the station I told him if I could help
 him, if I could take him to a doctor, and he said he could not
 to get his own doctor. He was in a hurry to get his train. I
 took him to the Pennsylvania General Station, the lower level.
 Then I hit this bump and this depression in the street there, I
 noticed that I kind of went up and then down, and that as I came
 down one of the inclines, I went down again and I heard him holloa,
 'Oh, my back.' I turned around and I saw him, he was his hand
 back there. * * * The extent of those bumps or depression was and
 west would run about 30 to 40 feet. * * * It is kind of a bump and
 you sink in as you come out, to explain it, I am on a level with the
 cap, and I go down again, and just keep founding all the time. I
 couldn't say how deep the depression is, about 4 or 5 inches. You
 know, you go down and up, and then there is a dip, and I never
 measured it; that the witness "in a bunch of dyes" went back to
 the scene of the accident with an engineer and pointed out to him
 the place of the accident; that the witness made measurements. On
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 the accident happened) said, "It was not particularly smooth. In
 other words, speaking in engineering terms, we had what we call

vertical grooves. If I may describe it: you go up over a bump and come down under a bump and up over another one; if I may liken it to something you are all familiar with, it is like on the pavement where you go around the corner, in an automobile, you go up over that bump and down around again; it was a condition like that, was what it really was." He described the condition that he observed and elucidated a drawing. According to this witness, the greatest difference in the level of the pavement at the point where the accident occurred varied from plus two and one-half inches to minus seven inches, or a maximum of nine and one-half inches.

Dr. Kleutgen, after relating his qualifications, said that after the X-ray pictures were taken he read them with Dr. Royer when they were wet and later he read them himself when they were dry; that he found his patient had a fracture of the right pedicle, "which is the little arching bone leading from the body of the vertebra up, this particular vertebra, the cord runs through the space made by these pedicle bones coming together. He had a fracture and a slight rotation of the right pedicle and a fracture of the left transverse process, which is in a sense a rudimentary rib of the fifth lumbar vertebra on the left side;" that he saw plaintiff that evening; that his abdomen began to distend; that there was a great accumulation of gas gathering in his intestines; that his abdomen was terribly distended and for the first week he was not able to have any bowel movements or pass any gas by himself; that on the second day he noticed the patient was passing blood in his urine, which kept up for four or five days, and for ten days from a microscopical standpoint; that there was a slight transverse abrasion on his scalp; that he had him fitted with a steel jacket; that the X-ray pictures were taken in the presence of witness and under his supervision; that the pictures were examined and developed under his observation and are correct representations of the parts of the anatomy of plaintiff that they purport

vertical groove. If I lay down it: you go up over a bump and come down under a bump and up over another one; if I lay down it to something you are all familiar with, it is like on the pavement where you go around the corner, in an anticlockwise direction over that bump and down around a rim; if we consider the line that was what it really was. He described the condition that he observed and elucidated a drawing. According to this drawing, the greatest difference in the level of the pavement at the point where the accident occurred varied from four and one-half inches to nine and seven inches, or a maximum of nine and one-half inches.

Dr. Alving, after relating his qualifications, said that after the X-ray pictures were taken he read that with Dr. Rosen when they were set and later he read them himself when they were dry; that he found his patient had a fracture of the right pedicle, "which is the little arching bone leading from the body of the vertebra up, this particular vertebra, the cord runs through the space made by these pedicle bones coming together. He had a fracture and a slight rotation of the right pedicle and a fracture of the left transverse process, which is in a sense a transverse rib of the fifth lumbar vertebra on the left side;" that he saw plainly that evening that his abdomen began to distend; that there was a great accumulation of gas gathering in his intestines; that his abdomen was terribly distended and for the first week he was not able to have any bowel movements or pass any gas by himself; that on the second day he noticed the patient was passing blood in his urine, which kept up for four or five days, and for ten days from a microscopic standpoint; that there was a slight transverse depression on his neck; that he had him lifted with a steel jacket; that the X-ray pictures were taken in the presence of him and under his supervision; that the pictures were examined and developed under his observation and his correct recommendations of the parts of the anatomy of himself that they reported

to show. The pictures were introduced in evidence. Witness further stated that "the fracture of the pedicle is right through here and that is twisted on itself (indicating). The fracture of the transverse process is right here (indicating). And that bone is rotated on itself. That indicates complete fracture or complete severance of the bone. The transverse process is also a complete severance.

* * * The pedicle is still rotated but you no longer see that shadow, that dark irregular shadow running through the fracture showing that there is fibrous union through there and the transverse process shows the fracture, but there is still some evidence of fibrous union up above. It shows some healing. The difference between a bony union and a fibrous union is that the fibrous union is more like scar, heavy scar tissue;" that witness warned plaintiff that he was to cease carrying any weights; that he was to be careful about putting on weight; that when witness last saw plaintiff the latter had a "fibrous union at the side of his fractured pedicle and fractured transverse process; that he had as good a result as could be expected at that particular time, but that the result was such that he would have to be very careful in subjecting himself to any excess weight-carrying. * * * Fracturing a pedicle which heals with fibrous union in a rotated position has the effect of weakening the vertebral column at a point where the weight of the upper body is actually borne. It is immediately above or it is the vertebra immediately above the sacrum. The fifth lumbar vertebra rests upon the sacrum. Answering your question as to what would be the effect upon the body of a person who had a transverse process which healed in that manner, I don't think that he would be likely to suffer any harm from a transverse process healing that way. The transverse process is the muscle supporting process. This bone is used for the attachment of muscles that support parts of the body. There is a constant pull in the movements of the body upon such a transverse process or vertebra

to show. The pictures were introduced in evidence. Witness further stated that "the fracture of the pedicle is right through here and that is twisted on itself (indicating). The fracture of the transverse process is right here (indicating), and that bone is rotated on itself. That indicates complete fracture or complete severance of the bone. The transverse process is also a complete severance. * * * The pedicle is still rotated but you no longer see that shadow, that dark line which shows through the fracture showing that there is a fibrous union through there and the transverse process shows the fracture, but there is still some evidence of fibrous union up above. It shows some healing. The difference between a bony union and a fibrous union is that the fibrous union is more like scar, heavy scar tissue; that is what is called fibrous union; that he was to cause carrying any weight; and he was to be careful about putting on weight; that when witness last saw defendant the latter had a "fibrous union at the site of his fractured pedicle and fractured transverse process; that he had as good a result as could be expected at that particular time, but that the result was such that he would have to be very careful in supporting himself so as to avoid weight-carrying. * * * Fracturing a pedicle which he is with fibrous union in a rotated position has the effect of weakening the vertebral column at a point where the weight of the upper body is actually borne. It is immediately above or it is the vertebra immediately above the sacrum. The fifth lumbar vertebra rests upon the sacrum. Answering your question as to what would be the effect upon the body of a person who had a transverse process which healed in that manner, I don't think that he would be likely to suffer any harm from a transverse process healing that way. The transverse process is the muscle support in process. This bone is used for the attachment of muscles that support parts of the body. There is a constant pull in the movements of the body upon such a transverse process or vertebra

of the muscular attachment so that if there is any damage which lasts, the muscular pull may or may not affect it." Answering a hypothetical question which assumed facts in evidence from plaintiff's viewpoint, witness answered that in his opinion the physical condition of plaintiff was permanent. He further testified that the patient's bowels were temporarily paralyzed; that the alignment of the spine was not affected; that "there are fibrous unions there but they are good unions. Those are not bony unions, they are fibrous unions;" that he advised plaintiff that he had sustained a fracture with a twisting of his entire pedicle, which "weakened the support between the body of his fifth lumbar spine and the muscular attachment which went to sustain that body in its position, and in weakening the support there was a great possibility that the body might slide forward from in under, or out from in under the body immediately above it, and that is the fourth lumbar spine, and slide forward on the sacrum, giving rise to chronic, very chronic back weakness, together with extremely painful back, which would necessitate either the wearing of a very stiff brace for the rest of his life, or an operation which would make that back rigid to free him of the pain from that condition, which was known as spondylethesis."

Arthur Smith, a witness for plaintiff, testified that he was employed as a gas station attendant at the Pure Oil Building garage, located on the south side of Wacker drive between State street and Wabash avenue; that he had been working at the garage for six years; that in October, 1935, he was familiar with the condition of the street underneath the viaduct at the lower level of Wacker drive, in the vicinity of State street; that he had "occasion to drive a lot on the lower level, and I always knew there was a bad hump under the State street there, at the lower level, at the east drive, going east, and I always had to slow up" when he got near the bump; that it was a bad bump; that "it is my reaction that it is

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 leads, the muscular pull may or may not affect it." In making a
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 operation which would make that back rigid to free him of the pain
 from that condition, which was known as spondylolisthesis."

Arthur Smith, a witness for plaintiff, testified that he
 was employed as a gas station attendant at the time Old Building
 Garage, located on the south side of Jackson Drive between State
 Street and Adams Avenue; that he had been working at the garage for
 six years; that in October, 1933, he was familiar with the condition
 of the street underneath the viaduct at the lower level of Jackson
 Drive, in the vicinity of State Street; that he had occasion to drive
 a lot on the lower level, and I always saw there was a bad bump under
 the State Street there, at the lower level, at the east drive,
 going east, and I always had to slow up" when he got near the
 bump; that it was a bad bump; that "it is my recollection that it is

a slight rise there at the very bottom, about sort of a double - it is very bad, sort of a double bump that would sort of bump you as though you were riding a horse;" that "it gives you the impression of riding on a bucking horse. It was about half a car length or so, from where you first started to go down the incline, to the next bump;" that the "particular bump in question has been repaired on the south side of the drive east. I did not see it being repaired."

Dean Weinberg, for plaintiff, testified that he also worked at the Pure Oil Building Garage and had worked there for six years, had used the lower level drive frequently and was familiar with the condition of the street on October 15, 1935, and prior thereto; that "there was a very bad bump just under the State street bridge approach, as you were driving to the east, you would hit the bump, if you would hit it with any rate of speed at all, you would have difficulty controlling your car."

For the defendant, Albert F. Bidlas testified that he was an inspector of the street department of the City and that his duties took him regularly to the lower level of Wacker drive; that there were no depressions or openings on the east drive in October, 1935. Mark C. Jenkins testified that he was a repair foreman for the City and had been such for sixteen years; that his duties were confined to the lower level of Wacker drive as a repairman to inspect the streets and make repairs when necessary; that he examined the lower level of Wacker drive once every week; that at no time except in March, 1935, were any repairs made on the south side of Wacker drive; that repairs were made at State street and Wacker drive in March, 1935; that no work has been done on the south side of Wacker drive at State street or that vicinity since April, 1935, and that it was in the same condition as he testified that it was in April, 1935; that Wacker drive at State street has been level since March, 1935. Julius Block testified that he is a clerk for the City; that if repair work was done since

a slight rise there at the very bottom, about 10 to 15 feet. It is very bad, sort of a double pump that only for a long time as though you are riding a horse; that "it gives you the impression of riding on a bucking horse. It was about half a century ago, from where you first started to go down the incline, to the next pump; that the "particular pump in question has been reported on the south side of the drive east. I did not use it being repaired."

Dean Weinberg, for plaintiff, testified that he also worked at the Pure Oil Building Garage and had worked there for six years, had used the lower level drive frequently and was familiar with the condition of the street on October 16, 1935, and prior thereto; that "there was a very bad pump just under the State street bridge approach, as you were driving to the east, you would hit the pump, if you would hit it with any rate of speed at all, you would have difficulty controlling your car."

For the defendant, Robert F. Bidias testified that he was an inspector of the street department of the City and that his duties took him regularly to the lower level of locker drive; that there were no depressions or openings on the east drive in October, 1935. Mark G. Jenkins testified that he was a repair foreman for the City and had been such for sixteen years; that his duties were confined to the lower level of locker drive as a repairman to inspect the streets and make repairs when necessary; that he examined the lower level of locker drive once every week; that at no time except in March, 1935, were any repairs made on the south side of locker drive; that repairs were made at State street and locker drive in March, 1935; that no work has been done on the north side of locker drive at State street or that vicinity since April, 1935, and that it was in the same condition as he testified that it was in April, 1935; that Walter drive at State street has been level since March, 1935. Julius Block testified that he is a clerk for the City; that if repair work was done since

October 15, 1935, he would have a record thereof and that he did not have a record. Earl H. Bolton testified that he was employed by M. J. Boyle & Company, which had a contract to put in a sewer connection at Wacker drive and State street, and he introduced a plat which he made of the lower level; that he could not say whether the blueprint that he produced correctly showed the condition of the south half of Wacker drive at State street in reference to any inequalities of areas on the street as of October 15, 1935. Maril Del Beccal testified that he supervised repairs for the City and had been so employed for seven or eight years; that in March, 1935, a contractor made a hole at approximately the west line of State street; that the hole was open about three weeks; that the contractor restored the street as it had been; that "we went back to see if it was perfect, and it was in good condition and we okeyed it and they had their bond money refunded;" that the hole was opened around the middle of March and closed around the middle of April; that when it was closed it was perfectly smooth and has been in that condition for at least four or five years. Joe Smejkal, a construction engineer for the S. A. Healy Company, testified that he had occasion to do some work on the north side of the east lane of Wacker drive at State street in March, 1935; in May, 1935, he observed that the hole was covered; that when they got through filling up the hole the pavement was level with grade. Dan Piegari testified that he was a street laborer employed by the City; that in October, 1935, he used to sweep the lower level of Wacker drive; that he was employed until the middle of 1936; that there was no work done on the south side or the east lane at State street; that the condition of the east lane of the lower level was "perfect." William Kelzow testified that he was a section foreman for the City and had been such for thirty-three years; that he was in charge of a gang whose duty it was to sweep the lower level of Wacker drive; that he walked on the lower level of Wacker drive at State street

October 13, 1935, he would have a record checked and that he did not have a record. Earl H. Bolton testified that he was employed by M. J. Boyle & Company, which had a contract to put in a connection at Wacker drive and State street, and he introduced a plat which he said of the lower level; that he could not say whether the blueprint that he presented correctly showed the condition of the south half of Wacker drive at State street in reference to any inequalities of areas on the street as of October 15, 1935. Earl H. Bolton testified that he supervised repairs for the city and had been so employed for seven or eight years; that in March, 1935, a contractor made a hole at approximately the west line of State street; that the hole was open about three weeks; that the contractor reported the street as it had been; that "we went back to see if it was perfect" and it was in good condition and we okayed it and they had their bond money refunded; that the hole was opened around the middle of March and closed around the middle of April; that when it was closed it was perfectly smooth and has been in that condition for at least four or five years. Joe Smith, a construction engineer for the U. S. Reilly Company, testified that he had occasion to do some work on the north side of the east lane of Wacker drive at State street in March, 1935; in May, 1935, he observed that the hole was covered; that when they got through filling up the hole the pavement was level with grade. Earl Hiebert testified that he was a street laborer employed by the city; that in October, 1935, he used to sweep the lower level of Wacker drive; that he was employed until the middle of 1935; that there was no work done on the south side on the east lane at State street; that the condition of the east lane of the lower level was "perfect". William Brown testified that he was a section foreman for the city and had been such for thirty-three years; that he was in charge of a gang who dug it was to sweep the lower level of Wacker drive; that he walked on the lower level of Wacker drive at State street

about four times each night; that he did not recall that any work was done on the south side of the lower level, in the east lane of traffic, in March, 1935; that there was no depression in the east lane of Wacker drive at State street in October, 1935. William Cavanagh testified that he was a mounted police officer for the City on duty in the area of Wacker drive; that at the time of the accident he was employed from 1 to 6 in the afternoons; that there was an opening in Wacker drive at about State street made by S. A. Healy & Company in March, 1935; that the opening started at the west curb line of State street and went west about ten feet and was in the part he would call the eastbound lane, but on the north side of the eastbound lane on the south side of the street; that the hole was barricaded and the traffic was diverted; that repairs were made and thereafter there were no holes or depressions; that he rode up and down the street frequently. He denied that on October 15, 1935, there was a place on the east drive at State street that sloped up several inches and then suddenly dropped down, and then sloped up a little, and then dropped down seven or eight inches more into a depression. J. F. Kramer testified that he was a police officer of the City and was assigned to traffic duty on the lower level of Wacker drive in 1937 and that the street was level at all times while he was on duty; that at about the time of the trial he observed the movement of the Yellow cab, the driver of which testified. Fred Darrow, a Yellow cab driver, testified that at about the time of the trial he drove over the place where the accident was alleged to have occurred and did not notice any depression in the street. Similar testimony was given by three other witnesses. Charles Boyle, a police officer assigned to the Accident Prevention Bureau, produced three pictures which he took at about the time of the trial at Wacker drive and State street, which were admitted into evidence. Edmund Sadowski, an investigator for the City law department, testified to a conversation

about four times each night; that he did not recall that any work was done on the south side of the lower level in the east lane of traffic, in March, 1937; that there was no inspection in the east lane of Becker drive at that street in October, 1937. William Cavanagh testified that he was a mounted police officer for the City on duty in the area of Becker drive; that at the time of the accident he was employed from 1 to 6 in the afternoon; that there was an opening in Becker drive at about that street made by A. A. Healy & Company in March, 1937; that the opening at that street was on the east curb line of State street and went west about ten feet and was in the part he would call the eastbound lane, but on the north side of the eastbound lane on the south side of the street; that the hole was barricaded and the traffic was diverted; that the traffic was diverted thereafter there were no holes or obstructions; that he took up and down the street frequently. He denied that on October 11, 1937, there was a place on the east drive at State street that sloped up several inches and then suddenly dropped down, and then sloped up a little, and then dropped down seven or eight inches more into a depression. J. W. Kramer testified that he was a police officer of the City and was assigned to traffic duty on the lower level of Becker drive in 1937 and that the street was level at all times while he was on duty; that at about the time of the trial he observed the movement of the Yellow cab, the driver of which testified, Fred Larrow, a yellow cab driver, testified that at about the time of the trial he drove over the place where the accident was alleged to have occurred and did not notice any depression in the street. Similar testimony was given by three other witnesses, Charles Boyle, a police officer assigned to the accident prevention bureau, two more police officers and which he took at about the time of the trial at Becker drive and State street, which were admitted into evidence. Edmund Sadowski, an investigator for the City law department, testified to a conversation

with Dr. Kleutgen. Victor Manino, an investigator for the City, testified that during the trial he rode in a Yellow cab past where the accident occurred; that he did not feel any jar while riding at a speed of from twenty-five to thirty miles an hour. Dr. David J. Jones, for the City, testified that he was a city physician for the City of Chicago; that he examined the X-ray pictures. To some extent he corroborates the testimony of Dr. Kleutgen. In answer to a hypothetical question as to whether or not "that condition" is permanent, he answered, "There is a partial permanent disability."

In rebuttal, Charles E. Taylor, who had previously testified, took the stand for plaintiff and testified that while the trial was in progress he went to the point where he had made the map and that where the depression existed the granite blocks had been taken up and relaid to a level grade.

Thomas Letkey, a witness called in rebuttal by plaintiff, testified that he was a police officer for the City and had been such for two years; that he traveled near State and Wacker drive on the lower level and had been on duty at that point for three months; that repairs had been made to the street during the time while he was traveling a beat there; that the repairs were made underneath State street on the east side; that the hole was about one foot deep; that he saw five or six men working there; that they had barricaded the hole; that they fixed one-half of the street one day and the other half the next day; that he saw them fix it.

A careful consideration of the evidence submitted to the jury convinces us that the verdict was not against the manifest weight of the evidence so far as the questions of liability of defendant and due care on the part of plaintiff are concerned, and defendant's contention to the ^{contrary} ~~the~~ is without merit. There was competent evidence from which the jury had the right to find that plaintiff was in the exercise of due care and caution for his own

safety
and that defendant was guilty of negligence which was the proximate cause of the injuries. Other criticisms leveled at the judgment are that in the presence of the jury, during the trial, the court made prejudicial remarks and displayed a hostile attitude toward counsel for defendant and also unduly restricted defendant's cross-examination of plaintiff's witnesses. Replying to these criticisms, plaintiff points out that the remarks and conduct of the court were not prejudicial to defendant, and, in addition, asserts that if a trial court is guilty of impropriety it is necessary to take an exception to the conduct of the court; that failing so to do there is nothing for the Appellate court to pass on. We are of the opinion that it is only necessary for counsel to object to the action of the court in such a manner as to reasonably inform the court as to why the objection is made. Section 80 of the Civil Practice Act (sec. 204, ch. 110, Ill. Rev. Stat. 1937) provides that "no formal exception need be taken to any ruling or action of the court in any matter or proceeding, in order to make such ruling or action a ground for review." We have made a thorough search of the abstract and record, and are of the opinion that when the remarks and attitude of the court are considered in connection with the entire record they do not show a prejudicial or hostile attitude on the part of the court.

Defendant urges that a verdict in the sum of \$7,000 is grossly excessive and out of proportion to the gravity of the injury and losses shown to have been sustained. It also maintains that the \$1,500 received from the Yellow Cab Company for a covenant not to sue, and the \$1,500 received from an accident insurance company, should be deducted from the verdict rendered. Plaintiff suffered a fracture of the right pedicle and a fracture of the left transverse process of the fifth lumbar vertebra; his kidney was injured; bloody urine was evacuated for approximately ten days; his abdomen was distended for about the same period; when the bones healed there was a fibrous and not a bony union,

allegedly

and that defendant was guilty of negligence which was the proximate cause of the injuries. Other and lesser facts at the judgment are that in the presence of the jury, during the trial, the court made prejudicial remarks and displayed a hostile attitude toward counsel for defendant and also unlawfully restricted defendant's cross-examination of plaintiff's witnesses. Referring to these criticisms, plaintiff points out that the remarks and conduct of the court were not prejudicial to defendant, and, in addition, asserts that it is trial court is guilty of impropriety if it is necessary to take an exception to the conduct of the court; that failing to do so there is nothing for the appellate court to base on. We are of the opinion that it is only necessary for counsel to object to the action of the court in such a manner as to reasonably inform the court as to why the objection is made. Section 80 of the Civil Practice Act (sec. 804, Ch. 110, Ill. Rev. Stat. 1937) provides that "no formal exception need be taken to any ruling or action of the court in any matter or proceeding in order to make such ruling or action a ground for review." We have made a thorough search of the abstract and record, and one of the opinion that when the remarks and attitude of the court are considered in connection with the entire record they do not show a prejudicial or hostile attitude on the part of the court.

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which condition is permanent; he will travel through life with a weak back; if he strains his back there may be a slipping of the vertebra from the sacrum; the pedicle is rotated, and that condition, together with the fibrous union rather than a bony union, causes a weakness at the weightbearing point of his body; he was required to wear a steel brace for about three months after the accident and must wear an elastic web belt, about ten inches wide, for the rest of his life; he must restrict his ordinary activities and cannot play golf, bowl or fish, as he had formerly done; he lost earnings of \$100 a week for about ten weeks, and had to pay physicians, nurses, a helper for about six months, and other items of expense. An examination of the record discloses that if the jury believed the competent evidence most favorable to plaintiff the verdict in the sum of \$7,000 is not excessive nor out of proportion to the gravity of the injury.

Under the objection that the damages awarded are excessive, arises the point that the \$1,500 paid by the accident insurance company should be deducted from the amount of the verdict. The court struck the testimony bearing on the accident insurance payment and directed the jury to disregard the same. Therefore, we assume that the jury did not consider the payment in arriving at their verdict. We do not find any case in this State which holds that the proceeds of accident insurance policies may be considered in mitigation of damages in a personal injury action arising out of the same accident. In fact, the authorities in our State are to the contrary. In P., C. & St. L. Railway Co. v. Thompson, 36 Ill. 138, 143, the court said:

"The eighth instruction asked by defendant, directing the jury to deduct from the damages any sum paid to the plaintiff by an accident insurance company, was properly refused. If such sum was paid, it was not pro tanto a discharge of the railway company. The primary liability was on this company."

And in Consolidated Coal Co. v. Shepherd, 112 Ill. App. 458, 461-2, the court said:

which condition is permanent; he will travel through life with a weak back; if he strains his back there may be a slipping of the vertebra from the sacrum; the pelvis is rotated, and that condition together with the fibrous union rather than a bony union, causes a weakness at the weight-bearing point of his body; he was required to wear a steel brace for about three months after the accident and must wear an elastic web belt, about two inches wide, for the rest of his life; he must restrict his ordinary activities and cannot play golf, bowl or fish, as he had formerly done; he lost earnings of \$120 a week for about ten weeks, and had to pay physicians, nurses, a helper for about six months, and other items of expense. An examination of the record discloses that if the jury believed the competent evidence most favorable to plaintiff the verdict in the sum of \$7,000 is not excessive nor out of proportion to the gravity of the injury.

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"The eighth instruction asked by defendant, directing the jury to deduct from the damages any sum paid to the plaintiff by an accident insurance company, was properly refused. It seems now was paid, it was not pro tanto a discharge of the railway company. The primary liability was on this company."

and in Consolidated Coal Co. v. Shepherd, 112 Ill. App. 488, 491-2, the court said:

"The testimony offered by defendant, that plaintiff received money of an accident association during disability, was properly excluded by the court. It had no legitimate bearing as evidence either in defense or rebuttal."

The trial court, therefore, properly struck out, and directed the jury to disregard, evidence of the \$1,500 payment by the accident insurance company.

The fact that \$1,500 was received by plaintiff for a covenant not to sue was presented and argued to the jury, and an instruction based on that evidence was given. An examination of the record discloses that it was the position of defendant that the payment of \$1,500 by the Yellow Cab Company should be considered in connection with any damages to be awarded. The position of defendant is that under the evidence the \$1,500 paid by the Yellow Cab Company and the \$1,500 paid by the accident insurance company fully compensated plaintiff for the losses and injuries he suffered. We have already pointed out that the court was right in directing the jury to disregard testimony as to the \$1,500 paid by the accident insurance company. Plaintiff argues that money paid on a covenant not to sue by a person not a party to the suit cannot be considered by the jury in mitigation of damages, and cites in support thereof Devaney v. Otis Elevator Co., 251 Ill. 28. In City of Chicago v. Babcock, 143 Ill. 358, 366-7, the court said:

"Where there are a number of tort feorsors, the party injured may, at his election, sue one, or several, or all; and where the suit is against one or some of the wrongdoers, but not against all, the person or persons sued have no right to complain. * * * If, as claimed by appellee, the \$150 was paid and received simply in consideration of the agreement not to sue LeCardi, and not in satisfaction of the damages, but only in part payment of the same, then the transactions between appellee and LeCardi did not amount to an accord and satisfaction, and were no bar to the suit against appellant. In fact, it was for the interest of the latter that appellee should receive part payment of her claim from LeCardi, and thereby reduce the amount of damages recoverable from it." (Italics ours.)

In the Devaney case there was an action pending against three defendants. In consideration of \$375 the plaintiff gave Otis Elevator Company a covenant not to sue, and the action proceeded against the

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cloves that it was the position of defendant that the payment of

\$1,500 by the Yellow Cab Company should be considered in connection

with any damages to be awarded. The position of defendant is that

under the evidence the \$1,500 paid by the Yellow Cab Company and the

\$1,500 paid by the accident insurance company fully compensated plain-

tiff for the losses and injuries he suffered. He has already pointed

out that the court was right in directing the jury to disregard that

money as to the \$1,500 paid by the accident insurance company. Plaintiff

argues that money paid on a covenant not to sue by a person not a

party to the suit cannot be considered by the jury in mitigation of

damages, and cites in support thereof Rowley v. Otto Elevator Co.

251 Ill. 38. In City of Chicago v. Babcock, 148 Ill. 33, 306-V, the

court said:

"Where there are a number of tortfeasors, the party injured may, at his election, sue one, or several, or all; and where the suit is against one or some of the wrongdoers, but not against all, the person or persons sued have no right to complain. * * * If, as claimed by appellee, the \$150 was paid and received simply in consideration of the agreement not to sue defendant, and not in mitigation of the damages, but only in part payment of the same, then the transaction between appellee and defendant did not amount to an accord and satisfaction, and there was no bar to the suit against defendant. In fact, it was for the interest of the latter that a release should receive part payment of her claim from defendant, and thereby reduce the amount of a future recovery from it." (Ill. case)

In the Rowley case there was an action pending against three defend-

ants. In consideration of \$375 the plaintiff gave Otto Elevator

Company a covenant not to sue, and the action proceeded against the

other two defendants. The court, at the instance of plaintiff, instructed the jury that in estimating the damages, from the amount of actual damages sustained should be deducted \$375 if the jury believed that the Otis Elevator Company was jointly guilty with the other defendants of the negligence that caused the injury; and the jury were also informed that if the Otis Elevator Company was not guilty of negligence which proximately contributed to the injury, the \$375 should not be deducted from the actual damages sustained by the plaintiff. The Supreme court held that the instruction improperly submitted to the jury the issue as to whether the Otis Elevator Company was guilty of contributory negligence in connection with the injury when no such issue was made in the pleadings. In principle we do not see why the law as laid down in City of Chicago v. Babcock should not apply, whether the person or corporation receiving the covenant not to sue is or is not a party to the action.

As bearing on its point that the damages awarded are excessive, defendant complains that the following instruction:

"If you find from all the evidence under the instructions of the court that the plaintiff is entitled to a verdict against the City of Chicago, then in assessing plaintiff's damages, while you have a right to take into consideration the sum of money paid to the plaintiff by the Yellow Cab Company, yet that sum of money so paid by the Yellow Cab Company is not to be taken as any indication of the extent of the plaintiff's damages in considering the amount of your verdict,"

is misleading and confusing to the jury, "first, in that it assumes that the plaintiff is entitled to more than the \$1,500 he received from the Yellow Cab Company. Second, that it was for the jury to say or determine under proper instructions of the court whether or not the \$1,500 received from the Yellow Cab Company by the plaintiff indicated the extent of the plaintiff's damages, without drawing the jury's attention to this particular fact." A rather unusual situation develops in the arguments of the respective counsel in connection with the giving of this instruction. Plaintiff points out that defendant's brief and the abstract state that the instruction

was given by the court, and asserts that in fact the instruction was tendered by defendant, that in arguing the motion for a new trial such fact was called to the attention of the trial court, and that the trial attorney for the City admitted during such argument that the instruction now complained of by the defendant was tendered by it. In its reply brief the defendant does not directly answer the positive statement that the instruction was tendered by it. Defendant inferentially contends that the instruction was tendered by plaintiff, saying that Point 14 of its written motion for a new trial states:

"The court erred in giving for the plaintiff the following instruction:

"If you find from the evidence under the instructions of the court that the plaintiff is entitled to a verdict against the City of Chicago, then in assessing plaintiff's damages, while you have a right to take into consideration the sum of money paid to the plaintiff by the Yellow Cab Company, yet that sum of money so paid by the Yellow Cab Company is not to be taken as any indication of the extent of the plaintiff's damages in considering the amount of your verdict."

Plaintiff urges that in view of the fact that the record does not show on whose request the instruction was given, defendant cannot complain. In Shively v. McKinney, 84 Ill. App. 406, 407, the court said:

"While the instructions of the court are fully set out in the bill of exceptions, it is not shown which of them were given at the instance of appellant, or appellee, nor does it show that any of the refused instructions were requested by appellant, thereby producing such condition of uncertainty from which it is impossible for us to determine in what manner appellant has been prejudiced by them. The burden is upon the party alleging error to show it affirmatively."

Despite the rule there announced, we have gone through the record in an endeavor to ascertain upon whose request the instruction was given, and observe that when the court was going over the proposed instructions with the attorneys Mr. Harrington, counsel for the defendant stated, "All right. Now, there is another instruction about showing tort feason and the defendant's interest in the case, because money had been paid. Mr. Falk [also for

defendant]: In mitigation of damages. We will have our cases here at two o'clock, Judge, in mitigation of damages. Mr. Harrington: We take the position that he should have collected the full amount of the bill, if he was paid part of it by the other party. I think that is good common sense." It would appear from the wording of the instruction and from the quoted remarks of counsel for the defendant that the instruction was in fact tendered by the defendant. We are of the opinion that the instruction, under all the facts of the case, would not be ground for reversal even if tendered by plaintiff. The instruction made it plain to the jury that they were first to determine the guilt of the defendant. Having determined that the defendant was guilty as charged in the complaint, it was their duty then to consider the question of damages. As to the damages the instruction merely informed the jury that while they had a right to take into consideration the sum of money paid by the Yellow Cab Company, yet such payment was not to be taken as any indication of the extent of plaintiff's damages. A reading of this instruction satisfies us that the instruction does not assume that the damages were at least \$1,500. However, even if that construction could be given to the instruction the defendant would not be harmed thereby because it is not disputed that the indebtedness incurred by plaintiff for nurses, physician and X-rays, and the earnings lost by him in his occupation as a salesman for a period from October 15, 1935, until January 1, 1936, at the rate of \$100 per week, all of which sums appear reasonable, amount to more than \$1,500. Indisputably the \$1,500 received from the Yellow Cab Company would not be sufficient to compensate plaintiff for these expenses and losses, and for his injuries and physical and mental suffering. The instruction left to the jury the matter of deciding what the damages should be. In assessing damages the jury had the right to consider the sum of money paid by the Yellow Cab Company,

defendant: In mitigation of damages. I will have our case
 here at two o'clock, Judge, in mitigation of damages. Mr. [Name]
 We take the position that he should have collected the full amount of
 the bill, if he was paid part of it by the other party. I think
 that is good common sense. It would appear from the wording of the
 instruction and from the quoted remarks of counsel for the defendant
 that the instruction was in fact tempered by the defendant. To ask
 of the opinion that the instruction, under all the facts of the case,
 would not be ground for reversal even if tendered by plaintiff. The
 instruction made it plain to the jury that they were first to deter-
 mine the guilt of the defendant. Having determined that the defendant
 was guilty as charged in the complaint, it was their duty then to
 consider the question of damages. As to the charges the instruction
 merely informed the jury that while they had a right to take into
 consideration the sum of money paid by the Yellow Cab Company, yet
 such payment was not to be taken as any indication of the extent of
 plaintiff's damages. A reading of this instruction established us that
 the instruction does not assume that the damages were at least \$1,000.
 However, even if that assumption could be given to the instruction
 the defendant would not be harmed thereby because it is not stated
 that the indebtedness incurred by plaintiff for nurses, physician and
 X-ray, and the earnings lost by him in his occupation as a salesman
 for a period from October 18, 1933, until January 1, 1936, at the rate
 of 100 per week, all of which would amount to some \$1,000 or more
 than \$1,500. Indubitably the \$1,000 received from the Yellow Cab
 Company would not be sufficient to compensate plaintiff for these
 expenses and losses, and for his physical and mental
 suffering. The instruction left to the jury the matter of deciding
 what the damages should be. In assessing damages the jury had the
 right to consider the sum of money paid by the Yellow Cab Company,

and we cannot assume that in awarding damages in the sum of \$7,000 they did **not** consider the \$1,500 that plaintiff had received from the Cab Company.

From a consideration of the entire record and the points made by the parties, we are impelled to the view that the judgment of the Circuit court of Cook county should be, and it is, affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

and we cannot assume that it was in fact so. In fact, they did not consider the 1,000 that Laddell had received from the Gap Company.

From a consideration of the entire record and the points made by the parties, we are impelled to the view that the judgment of the Circuit Court of Cook County should be, and it is, affirmed.

JUDGE DEL. DEL. DEL.

Gulliver and Friend, 11, common.

40062

BENJAMIN B. MORRIS,
Appellee,

v.

PAUL WAHL,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

298 I.A. 625³

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On a bench trial in the Municipal court of Chicago in a case wherein plaintiff sought to recover on two bonds payment of which defendant had guaranteed, judgment was rendered against defendant in the sum of \$2,890 to reverse which defendant prosecutes this appeal.

On June 6, 1928, Edward Seelmann executed \$250,000 of bonds, which were underwritten and sold by Greenebaum Sons Investment Company and secured by a first mortgage trust deed on improved real estate in Chicago known as "Produce Merchants Building." Defendant, by a separate agreement in writing made with Greenebaum Sons Investment Company, guaranteed prompt payment of the bonds and interest, which guaranty insured to the benefit of Greenebaum Sons Investment Company, the Bank of America, as trustee under said trust deed, and to each of the holders of the bonds and coupons. Default having been made in the performance of the covenants of the trust deed, the time of payment of the outstanding bonds was accelerated and they were called due January 15, 1932. Because of defaults in other Greenebaum issues and in anticipation of default under the issue here involved and others, a Committee had been formed for the protection of holders of Greenebaum bonds under a deposit agreement dated December 12, 1929. The Chicago Title and Trust Company was

BENJAMIN B. MONTGOMERY, Appellant.

Appellant.

298 I.A. 625

Mrs. Benjamin B. Montgomery, Plaintiff, vs. The Chicago Title and Trust Company, Defendant.

On a bench trial in the Municipal Court of Chicago in a case wherein plaintiff sought to recover on two bonds payable to which defendant had guaranteed, judgment was rendered against defendant in the sum of \$2,820 to reverse which defendant presented this appeal.

On June 6, 1932, Edward Seemann executed \$200,000 of bonds, which were underwritten and sold by Greenbaum Bond Investment Company and secured by a first mortgage trust deed on improved real estate in Chicago known as "Produce Merchants Building." Defendant, by a separate agreement in writing made with Greenbaum Bond Investment Company, guaranteed prompt payment of the bonds and interest, which guaranty insured to the benefit of Greenbaum Bond Investment Company, the Bank of Mexico, as trustee under said trust deed, and to each of the holders of the bonds and coupons. Defendant having been made in the performance of the covenants of the trust deed, the time of payment of the outstanding bonds was accelerated and they were called due January 15, 1933. Because of default in other Greenbaum issues and in anticipation of default under the issue here involved and others, a Committee had been formed for the protection of holders of Greenbaum bonds under a deposit agreement dated December 12, 1932. The Chicago Title and Trust Company was

designated as one of the depositories. The agreement was in the form usually employed in similar cases and gave the Committee power to deal with the deposited bonds, full title to which, both legal and equitable, was vested in the Committee. The agreement contemplated that bondholders would become parties thereto by the deposit of their bonds in exchange for certificates without the necessity of subscribing their names thereto. Plaintiff was an original purchaser of bonds Nos. 281 and 282, in the sum of \$1,000 each. On January 20, 1932, he went to the office of the Chicago Title and Trust Company. He testified that he left bonds 281 and 282 with a young lady at that office and "received a receipt by mail some days later." The "receipt" was certificate of deposit No. 89 and recites that it is a certificate of deposit for Produce Merchants Building first mortgage six per cent serial gold bonds deposited under an agreement dated December 12, 1929, as amended, by and between holders of such bonds and the Committee; that plaintiff has deposited under the agreement with the depository, Chicago Title and Trust Company, bonds Nos. 281 and 282, together with unpaid interest coupons, and that "the holder hereof is entitled to share in the benefits of said Agreement in respect of the Bonds against the deposit of which this Certificate is issued and to the rights and interests as a Depositor, as the same are specified and defined in said Deposit Agreement, an original of which has been filed with said Depository. The holder, by receiving this Certificate, assents to and is bound by the provisions of said Deposit Agreement in the same manner and with the same effect as if he had executed the same. The interest represented by this Certificate is transferable, subject to the terms and conditions of said Deposit Agreement, only on the books of said Depository by the holder hereof in person or by attorney upon surrender of this Certificate properly endorsed." At the time the bonds were delivered the depository made a separate entry in its bondholders ledger showing the

designated as one of the depositors. The instrument was in the form usually employed in similar cases and gave the committee power to deal with the deposited bonds, full title to which, both legal and equitable, was vested in the committee. The agreement contemplated that the bonds would remain in the hands of the committee of their bonds in exchange for certificates of the necessity of insuring their bonds. The committee was an original purchaser of bonds for \$100,000, in the sum of \$100,000 each. On January 20, 1932, he went to the office of the United States and Trust Company. He testified that he had come to the office with a young lady at that office and "received" a receipt of which was given to him. The "receipt" was certificate of deposit No. 100,000 and it is a certificate of deposit for the sum of \$100,000 and it is a six per cent serial gold bond of \$100,000 and it is dated December 12, 1929, as amended, by and between holders of such bonds and the committee; that the committee had deposited with the committee the depositary, United States and Trust Company, New York, New York, and the committee with unpaid interest coupons, and that the holder thereof is entitled to share in the benefits of said agreement in respect of the bonds against the deposit of which this certificate is issued, and to the rights and interests in a deposit, as the same are specified and defined in said deposit agreement, an original of which has been filed with said depositary. The holder, by receiving this certificate, assents to and is bound by the provisions of said deposit agreement in the same manner and with the same effect as if he had executed the same. The interest represented by this certificate is transferable, subject to the terms and conditions of said deposit agreement, only on the books of said depositary by the holder hereof in person or by attorney upon surrender of this certificate properly endorsed. At the time the bonds were delivered the depositary made a separate entry in its bondholders ledger showing the

name of plaintiff, his address as "1048 Conway Bldg., Chgo.," and that certificate of deposit No. 89 was issued on January 20, 1932. Plaintiff testified that he did not read the certificate of deposit until a number of years after he received it through the mail, "about two or three years ago, I think it was," and that he did not make any effort to see the deposit agreement mentioned in the certificate. Defendant proposed to the Committee that in consideration of his causing the equity of redemption to be conveyed to the Committee or its nominee the Committee or its nominee release him as guarantor and Seelmann as the mortgagor of and from any personal liability on account of the bonds and coupons on deposit with the Committee, and on September 17, 1932, the Bondholders Protective Committee mailed to the certificate holders, at the addresses shown on the books of the depository, a letter which, among other things, stated that "the Committee has an opportunity to acquire the equity in the property for the benefit of the depositing bondholders without the payment of any monies, the consideration for the conveyance being a release of the borrower and the guarantor of the bond issue from personal liability as to deposited bonds. The owner of the property will cause title to the property to be conveyed to a nominee of the Bondholders Committee, subject to the existing First Mortgage, taxes for the year 1928 and subsequent years, unpaid special assessments, the pending foreclosure proceedings, and to the general matters which are customarily noted in Chicago Title and Trust Company Owner's Guarantee Policies. The Committee, after consideration of the financial conditions of the borrower and the guarantor, recommends this transaction to the bondholders." Another paragraph of the letter states: "If you have deposited your bonds with one of the Depositaries for the Committee, you need take no action to evidence your assent to the settlement hereinabove outlined. The depositors who desire to dissent, however, must give written notice of their dissent to one of the Depositaries within

twenty days after the date of the mailing of this letter, pay their pro rata portion of the expenses, and withdraw their bonds as provided in the Deposit Agreement; otherwise, they will be deemed to have assented."

The Committee, on October 3, 1932, accepted the proposal, and defendant, Wahl, pursuant thereto caused the title to the property to be conveyed to the Committee's nominee, Harry G. Zimmerman. On January 11, 1933, the Committee covenanted to take no action to enforce the personal liability of Paul Wahl and Edward Seelmann upon the bonds and coupons and the guaranties, so far as the deposited bonds were concerned, and agreed, on the expiration of the period of redemption, to cause the trustee to satisfy any deficiency decree against Wahl and Seelmann as to the deposited bonds. Plaintiff neither dissented nor objected to the acceptance by the Committee of the proposal made by Wahl. He contends that the record does not show that he received the letter of September 17, 1932. The deposit agreement required that notices be mailed. There is competent evidence to show that the letter of September 17, 1932, was mailed to plaintiff.

On August 11, 1937, nearly five years after defendant had been released, plaintiff, asserting that he was the holder of bonds Nos. 281 and 282, sued defendant on the guaranty. If plaintiff knowingly deposited his bonds with the depositary, intending that he should be bound by the deposit agreement, it is plain that there was no basis for his suit against the guarantor. Plaintiff, a lawyer of many years' experience, deposited his bonds with the depositary and received a certificate. The certificate is plainly worded and the depositor is clearly informed that he is joining with others in an endeavor to work out a solution of their common problem under a deposit agreement dated December 12, 1929. Plaintiff received the certificate of deposit through the mail but did not read it until about two years

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The Committee, on October 3, 1932, accepted the proposal,
 and defendant, who, pursuant thereto caused the title to the property
 to be conveyed to the Committee's nominee, Henry A. Zimmerman. On
 January 11, 1933, the Committee consented to take no action to
 enforce the personal liability of said defendant and defendant upon
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 bonds were concerned, and agreed, on the expiration of the period of
 redemption, to cause the trustee to satisfy any deficiency decree
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 of many years' experience, deposited his bonds with the defendant
 and received a certificate. The certificate is plainly worded and
 the defendant is clearly informed that he is joining with others in an
 endeavor to work out a solution of their common problem under a deposit
 agreement dated December 15, 1932. Plaintiff received the certificate
 of deposit through the mail but did not read it until about two years

before he filed action. He was nevertheless charged with knowledge of the contents thereof. Having deposited his bonds with the depository, for which he received a certificate of deposit, he became a party to the agreement as effectually as if he had subscribed thereto. Here we turn to the deposit agreement and find that it contains the following provision: "The depositors severally and respectively do hereby sell, assign, and transfer to the Committee, its successors and assigns, the full legal, equitable and beneficial title to all bonds deposited hereunder, for all and singular the purposes hereof, and severally and respectively agree that the Committee shall be, and it is hereby, vested with every right, power and authority of whatsoever character, nature or purpose in order to enable the Committee to carry out and perform all and singular the purpose and intent of this agreement. The Committee shall have and may exercise in its discretion all the rights and powers of the respective owners or holders of said bonds deposited hereunder, and shall have the power to compromise, release, or settle any or all claims or rights of the depositors hereunder." It is contended by defendant that the proposal to release the maker and guarantor could have been accepted and carried into effect without sending a letter to the depositors. It is unnecessary for us to discuss that phase of the question as due notice was given and the plaintiff did not object.

It was contemplated that the proposed settlement would not become effective if more than ten per cent of the principal amount of deposited bonds dissented, and plaintiff argues that the record does not show that less than ten per cent dissented; to which defendant replies that the provision was clearly inserted for defendant's benefit and not for the benefit of the bondholders. There can be no doubt that such was the intention. Defendant did not wish to carry out the arrangement if more than ten per cent of the depositing bondholders

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of the contents thereof. Having deposited his bonds with the
depository, for which he received a certificate of deposit, he be-
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tains the following provision: "The depository severally and
respectively do hereby sell, convey and transfer to the Committee,
its successors and assigns, the full legal, equitable and beneficial
title to all bonds deposited hereunder, for all and singular the

purposes hereof, and severally and respectively agree that the
Committee shall be, and it is hereby, vested with every right, power
and authority of whatever character, nature or purpose in order to
enable the Committee to carry out and perform all and singular the
purpose and intent of this agreement. The Committee shall have and

may exercise in its discretion all the rights and powers of the
respective owners or holders of said bonds deposited hereunder, and
shall have the power to compromise, release, or settle any or all
claims or rights of the depository hereunder." It is contended by
defendant that the proposal to release the maker and guarantor could
have been accepted and carried into effect without securing a release
to the depository. It is unnecessary for us to discuss that phase
of the question as due notice was given and the defendant did not
object.

It was contemplated that the proposed settlement would not
become effective if more than ten per cent of the principal amount
of deposited bonds dissented, and plaintiff argues that the record
does not show that less than ten per cent dissented; in which defendant
replies that the provision was clearly intended for defendant's benefit
and not for the benefit of the bondholders. There can be no doubt that
such was the intention. Defendant did not wish to carry out the
arrangement if more than ten per cent of the depositing bondholders

dissented. Obviously, if a large percentage of the bondholders dissented the deficiency judgment against the maker and guarantor would be greater. The record shows that Wahl delivered the title in exchange for the release. The record does not show that more than ten per cent dissented. In any event it is clear that Wahl waived the point, which was for his benefit and not for the benefit of the bondholders.

The trial court rested its finding on what our Supreme court said in the case of Illinois Conference v. Plagge, 177 Ill. 431. In that case notes were transferred to a person who acted as agent for collection. He instituted an action in his own name and on his death the administrator of his estate was substituted as plaintiff. The court said (p. 434):

"The legal title to the notes which vested in the decedent fully authorized him to institute action in his own name, and upon his death the action did not abate, but survived to his administrator, and the appellee, in that capacity, was properly substituted as plaintiff. Whether others have an equitable or beneficial interest in the proceeds of the collection of a note need not be disclosed by the pleadings in an action at law by the party holding the legal title to the note. It is sufficient, in such case, the action is in the name of the holder of the legal title. Persons entitled to the beneficial interest may interfere in such actions and their rights will be protected, but in the absence of such interference defendants have no concern therewith. A judgment in favor of a party having possession of a promissory note and legal title thereto will constitute a legal defense against the payee of the note, though such possession and legal title be merely for the purpose of accomplishing the collection of the paper."

The facts in the Plagge case are not analogous to the facts in the case at bar, and the law there annunciated does not justify the entry of judgment against the defendant here.

On September 27, 1937 (while the instant cause was pending), plaintiff obtained the two bonds from the depository, on a trust receipt reading:

"Received, in Trust, from the Chicago Title and Trust Company, the following described property, to-wit: Bond #281-2 for \$1000.00 each - Produce Merchants Building each bond with interest coupon #7 to 20 attached, which property _____ hereby undertake to hold for and on account of said Company and subject to its order for the purpose of selling or otherwise dealing with said property, as said Company

of the bondholders.

The court said (p. 434):

"The legal title to the notes which vested in the bank in-
fully authorized him to purchase them in his own name, and upon
his death the action did not abate, but devolved to his adminis-
trator, and the appellee, in the capacity, and properly substantiated
as plaintiff. Whether officers have an equitable or beneficial interest
in the proceeds of the collection of a note need not be disclosed by
the pleadings in an action brought by the party holding the la-
title to the note. It is sufficient, in such case, the action is in
the name of the holder of the legal title, persons entitled to the
beneficial interest may first be in such actions and their rights
will be protected, but in the absence of such interest defense
have no concern therewith. The fact of a party having
possession of a promissory note and legal title thereto will con-
stitute a legal defense to the action of the note, though such
possession and legal title be merely for the purpose of accomplishing
the collection of the debt."

entry of judgment against the defendant here.

case at bar, and the law there articulated does not justify the

The facts in this case are not confined to the facts in this

plaintiff obtained the two books from the defendant, on a trust receipt reading:

"Received, in full, from the Office of M. L. and W. H. Company, the following described property, to-wit: Bond #82-2 for \$100.00 each - Product Chemicals Building, a cash bond with interest coupon V to SO attached. Such property hereby undertake to hold for and on account of said company and [blank] to its order for the purpose of selling or otherwise dealing with said property, as said Company."

may direct and when sold, to pay in the net proceeds to said Company. _____ hereby acknowledge _____ to be the Bailee of said property for said Company.

"Such securities or the proceeds thereof to be accounted for to the Chicago Title and Trust Company within _____ hours.

"Chicago, Sept. 17, 1937 at _____ o'clock, _____ M.

"O.K. T.J.H."

The trust receipt did not give plaintiff any authority to institute the action. The obligation of the guarantor had already been released. The release, executed by the Bondholders Committee, was binding on plaintiff.

Other points urged by the parties have been considered, but in view of what has been said no useful purpose will be served by further extending the opinion.

For the reasons stated the judgment of the Municipal court of Chicago is reversed and judgment is entered here for costs for the defendant and against plaintiff.

JUDGMENT REVERSED, AND JUDGMENT HERE
AGAINST PLAINTIFF FOR COSTS.

Sullivan and Friend, JJ., concur.

may direct and when sold, to pay in the proceeds to the
Company. It is hereby agreed that the proceeds of said property for said Company.

"Such accounts on the proceeds thereof to be accounted
for to the Chicago Title and Trust Company within _____ months."

"Benjamin F. Perkins
Chicago, Sept. 14, 1937 at _____ o'clock, P.
M." "S.W. T.H."

The trust receipt did not give plaintiff any authority to institute
the action. The obligation of the grantor has already been re-
leased. The release, executed by the Condolence Committee, was
binding on plaintiff.

Other points urged by the parties have been considered, and
in view of what has been said no useful purpose will be served by
further extending the opinion.

For the reasons stated the judgment of the municipal court
of Chicago is reversed and judgment is entered here for costs for
the defendant and against plaintiff.

THOMAS J. MURPHY, JUDGE
ALLIEN B. MURPHY, CLERK

Sullivan and Friend, 11, counsel.

40322

ROY SNECK
(Plaintiff),

Appellant,

v.

OLGA SNECK
(Defendant and Counterclaimant),
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

298 I.A. 625⁴

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On April 4, 1935, plaintiff filed his complaint in the Superior court of Cook county and averred that for the two years preceding he had been an actual resident of Chicago; that he was lawfully joined in marriage to the defendant on June 29, 1927, at New York City, and cohabited with her as her husband until December 14, 1933, when she wilfully and without any reasonable cause deserted him; that no children were born of the marriage, and that she persisted in such desertion. He prayed for a divorce. The complaint was duly verified before a notary public in Cook county, on March 24, 1935. Defendant, who resided in New York, was served by publication and mailing of notice, and filed her appearance and answer. The answer denied all the allegations of the complaint. On June 4, 1935, the court entered an order directing plaintiff to pay defendant \$25 per week as temporary alimony during the pendency of the cause and \$200 as temporary solicitors' fees. On November 5, 1935, a rule was entered requiring plaintiff to show cause why he should not be punished for contempt of court for having failed to comply with the order for temporary alimony and solicitors' fees, and on November 21, 1935, the court ordered an attachment to issue directing the sheriff to bring plaintiff before the court. On December 8, 1935, defendant filed a counterclaim, which had been sworn to before a notary public in New York City on May 17, 1935. The counterclaim

ROY SMITH
(Plaintiff),

v.

OLGA SMITH
(Defendant and Counter Plaintiff),
Appellee.

IN SENATE

OF NEW YORK

1935

MR. FRANKLIN J. BURNETT, CLERK OF THE COURT.

On April 4, 1935, Plaintiff filed his complaint in the Superior Court of Cook County and averred that for the two years preceding he had been an actual resident of Chicago; that he was lawfully joined in marriage to the defendant on June 28, 1934, at New York City, and cohabited with her as her husband until December 14, 1935, when she willfully and without any reasonable cause deserted him; that no children were born of the marriage, and that the defendant stated in such desertion. He prayed for a divorce. The complaint was duly verified before a notary public in Cook County, on March 24, 1935. Defendant, who resided in New York, was served by publication and mailing of notice, and filed her appearance and answer. The answer denied all the allegations of the complaint. On June 4, 1935, the court entered an order directing Plaintiff to pay to the defendant \$25 per week as temporary alimony during the pendency of the cause and \$50 as temporary solicitor's fees. On November 1, 1935, a rule was entered requiring Plaintiff to show cause why he should not be punished for contempt of court for having failed to comply with the order for temporary alimony and solicitor's fees, and on November 21, 1935, the court ordered an attachment to issue directing the sheriff to bring Plaintiff before the court. On December 8, 1935, defendant filed a counterclaim, which has been sworn to before a notary public in New York City on May 17, 1935. The counterclaim

alleged that plaintiff "is a resident of the City of Chicago, County of Cook, and State of Illinois;" that counterclaimant was a resident of New York City; that she married plaintiff "at the Little Church Around the Corner," in New York City, on June 29, 1927, and cohabited with him as his wife until June 9, 1934; that plaintiff, without any reason or cause therefor, wilfully deserted and absented himself from her; that since then he refused to live and cohabit with her and refused to supply her "with any of the necessaries of life or with funds to purchase the same; that as a consequence thereof defendant is now living separate and apart from the plaintiff without any fault on her part;" that due to his treatment of her she suffered a nervous and physical collapse and was broken in health, and had been forced to borrow from friends and to obligate herself for medical care and maintenance, to the extent of approximately \$100 per week; that plaintiff was a man of wealth "and is an outstanding vaudeville performer, specializing in the playing of fretted instruments, and has attained the pinnacle in his particular field of endeavor, commanding a salary in excess of \$500 per week, and that he is virtually constantly employed in this activity in various cities throughout the United States;" and counterclaimant prayed that she be awarded a "judgment for separate maintenance," and that plaintiff be ordered to make suitable and proper provision for her separate maintenance and support. Plaintiff was ruled to plead, and on January 20, 1936, he filed his answer to the counterclaim, wherein he admitted counterclaimant's allegation that "Roy Smeck is a resident of the City of Chicago, County of Cook and State of Illinois;" he neither admitted nor denied her allegation that she was a resident of the City of New York; admitted the marriage and that they lived and cohabited together as husband and wife; denied that she faithfully performed her duties and obligations as a wife;

alleged that plaintiff "is a resident of the City of Chicago, County of Cook, and State of Illinois;" that defendant was a resident of New York City; that the married plaintiff "at the Little Church Around the Corner," in New York City, on June 29, 1927, and cohabited with him as his wife until June 9, 1928; that plaintiff, without any reason or cause whatever, willfully deserted and abandoned himself from her; that since then he refused to live and cohabit with her and refused to supply her "with any of the necessities of life or with funds to purchase the same; that as a consequence thereof defendant is now living separate and apart from the plaintiff without any fault on her part;" that due to his treatment of her she sustained a nervous and physical collapse and was broken in health, and had been forced to borrow from friends and to obligate herself for medical care and maintenance, to the extent of approximately \$100 per week; that plaintiff was a man of wealth and is an outstanding and well-known performer, specializing in the playing of fretted instruments, and has attained the pinnacle in his particular field of endeavor, commanding a salary in excess of \$200 per week, and that he is virtually constantly employed in this activity in various cities throughout the United States;" and defendant prays that she be awarded a judgment for separate maintenance, and that plaintiff be ordered to make suitable and proper provision for her support, maintenance and support. Plaintiff was tried to plead, and on January 30, 1928, he filed his answer to the complaint, wherein he admitted defendant's allegations that "Ray Mack is a resident of the City of Chicago, County of Cook and State of Illinois;" he neither admitted nor denied her allegations that she was a resident of the City of New York; admitted the marriage and that they lived and cohabited together as husband and wife; denied that she faithfully performed her duties and obligations as a wife;

denied that on June 9, 1934, without any reason or cause therefor he wilfully deserted and absented himself from the counterclaimant, and asserted that on December 14, 1933, she wilfully deserted and absented herself from plaintiff without any reasonable cause, for the space of one year and upwards, "and has refused to live and cohabit with this plaintiff;" insisted that he at all times supplied her with the necessary funds on which to live; denied that he is now living separate and apart from her without any fault on her part; denied that she suffered a nervous and physical collapse; denied her allegations as to his ability to earn a large salary, and denied that she was entitled to any of the relief that she sought. The case came on for trial on April 5, 1938, at which time counsel for plaintiff, who was also his counsel at the time the complaint was filed, said: "If the Court please, I represent the plaintiff in this matter, Roy Smeck. He finds that he is unable to prove that he has been an actual resident of the State of Illinois for the period of one year immediately before the filing of his bill for divorce herein and moves that his bill of complaint be dismissed." Counsel for counterclaimant objected and the court reserved ruling on the motion. The solicitor for plaintiff was then called to the stand by counterclaimant, and testified that he was retained by plaintiff; that the complaint was verified in his office; that plaintiff told him at the time the complaint was filed that he (plaintiff) was a resident of Chicago for more than one year prior thereto, and that plaintiff also told him he was an actual resident of Cook county at the time the complaint was filed; that witness had known plaintiff for two or three years prior thereto; that witness knew plaintiff appeared in Chicago "innumerable times" prior to the filing of the complaint; that he remained a week, or two or three weeks at a time while performing at various theaters; that preceding the time the complaint was filed he had been actually present in Chicago three or four

denied that on June 2, 1934, without any reason or cause therefor, he willfully deserted and abandoned himself from the courtship and, and asserted that on December 14, 1933, she willfully deserted and abandoned herself from plaintiff without any reasonable cause, for the space of one year and upwards, "and has refused to live and cohabit with this plaintiff;" stated that he at all times supplied her with the necessary funds on which to live; denied that he is now living separate and apart from her without any fault on her part; denied that she suffered a nervous and physical collapse; denied her allegations as to his ability to earn a large salary, and denied that she was entitled to any of the relief that she sought. The case came on for trial on April 5, 1933, at which time counsel for plaintiff, who was also his counsel at the time the complaint was filed, testified that the Court please, I represent the plaintiff in this matter, "If the Court please, I find that he is unable to prove that he has been an actual resident of the State of Illinois for the period of one year immediately before the filing of his bill for divorce herein and moves that his bill of complaint be dismissed." Counsel for counter-claimant objected and the court reserved ruling on the motion. The solicitor for plaintiff then called to the stand by counter-claimant, and testified that he was retained by plaintiff; that the complaint was verified in his office; that plaintiff told him at the time the complaint was filed that he (plaintiff) was a resident of Chicago for more than one year prior hereto, and that plaintiff also told him he was an actual resident of Cook County at the time the complaint was filed; that when known plaintiff for two or three years prior thereto that whereas known plaintiff appeared in Chicago "innumerable times" prior to the filing of the complaint that he remained a week or two or three weeks at a time while performing at various theaters; that preceding the time the complaint was filed he had been actually present in Chicago three or four

weeks; that he then proceeded to the Pacific coast; that he returned to Chicago frequently until the court issued an attachment; that he has not been in Chicago since the attachment was issued; that at the time witness was retained plaintiff brought a friend of his to witness's office; that the friend "vouched for the fact that he [plaintiff] was a resident of Chicago, and said he was willing to take the stand and vouch for him."

Counterclaimant testified that she resided in New York City all her life; that she had never resided in Illinois; that she and plaintiff were married at New York City on June 29, 1927; that the separation occurred in Detroit, in June, 1934, where plaintiff was playing an engagement; that his next engagement was in Chicago; that he decided not to take her with him; that he did not wish to take her with him because he was in love with another woman; that she knew the name of the other woman; that she has lived separate and apart from him since June, 1934; that when they separated he was earning \$500 a week; that in England he received \$600 per week; that in this country his salary runs "from \$350 up;" that she met him at different times and requested that he resume marital relations with her, the last time about a year and a half before the trial; that "he is the finest [banjo player] in the country. He is a genius;" that he was in arrears in temporary alimony in the sum of \$2,225. On cross-examination she stated that when they lived together they had a joint bank account and also an account in a building and loan association; that when they separated she received \$6,000 and he received \$12,000; that she had the automobile which they possessed, which she has been saving for him; that she possessed the household furniture; that she was in the show business herself at one time; that she signed and swore to the counterclaim and that therein she swore that plaintiff was a resident of Chicago. Mrs. Julia D. Schaeffer testified that she resided in New York City and is the mother of counterclaimant; that the parties went to Detroit in June, 1934, and have not lived to-

weeks; that he then proceeded to the public dock; that he returned to Chicago frequently until the court issued an attachment; that he has not been in Chicago since the attachment was issued; that at the time witness was retained as a witness in the trial of the plaintiff; that the trial was held in the first of the month of June, 1934; that the plaintiff was a resident of Chicago, and said he was willing to take the stand and swear for him."

Countersuitant testified that she resided in New York City all her life; that she had never resided in Illinois; that she and plaintiff were married at New York City on June 22, 1927; that the separation occurred in Detroit, in June, 1934, where plaintiff was playing an engagement; that his next engagement was in Chicago; that he decided not to take her with him; that he did not wish to take her with him because he was in love with another woman; that she knew the name of the other woman; that she has lived separate and apart from him since June, 1934; that when they separated he was earning \$300 a week; that in England he receives \$200 per week; that in this country his salary runs "from \$300 up"; that she met him at different times and requested that he resume marital relations with her, the last time about a year and a half before the trial; that "he is the finest [best] player in the country. He is a genius"; that he was in arrears in temporary alimony in the sum of \$2,225. On cross-examination she stated that when they lived together they had a joint bank account and also an account in a building and loan association; that when they separated she received \$6,000 and he received \$2,000; that she had the automobile which they possessed, which she had been giving for him; that she possessed the household furniture; that she was in the show business herself at one time; that she claimed and swore to the countersuit and that therein she swore that plaintiff was a resident of Chicago. Mrs. Julia D. Connelley testified that she resided in New York City and is the mother of countersuitant; that the parties went to Detroit in June, 1934, and have not lived to-

gether since then; that she had a conversation with plaintiff since the separation in which she asked him to come back, and he answered, "Well, Mother, I am sorry but I can't do it. I fell in love with another girl."

Plaintiff did not appear at the trial or offer any testimony. At the close of all the evidence plaintiff, by his counsel, moved to dismiss the counterclaim "for want of jurisdiction, there being no evidence that either complainant or defendant are residents of this state." The decree for separate maintenance entered on April 20, 1938, dismissed plaintiff's complaint for divorce and awarded counterclaimant a decree for separate maintenance; directed plaintiff to pay her \$50 per week for her separate maintenance until the further order of the court; that he pay \$2,250 within two days, the amount that he was in arrears in temporary alimony; that he pay her \$500 for her solicitors' fees; and reserved jurisdiction for the purpose of enforcing the provisions of the decree and for the purpose of acting upon a petition for a writ of attachment. On the same day the court entered an order directing that a writ of attachment issue, commanding the sheriff to bring before the court the body of Roy Smeck. An affidavit, sworn to by counterclaimant on April 30, 1935, and filed on May 7, 1935, recites that on information and belief plaintiff's annual income is in excess of \$15,000, consisting principally of earnings from his professional work as a vaudeville performer and royalties which he receives from musical instruction books of which he is the author, and from musical instruments and accessories of which he is the inventor or originator, and that he earns approximately \$500 a week.

The first point urged by plaintiff is that counterclaimant did not allege and prove that either she or plaintiff were residents of Cook county, Illinois, at the time of the filing of his complaint for divorce or at the time of the filing of her counterclaim for separate maintenance. Prior to the amendment filed with the

either since then; that she had a conversation with Plaintiff since the separation in which she asked him to come back, and he answered, "Well, Mother, I am sorry but I can't do it. I fall in love with another girl."

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The first point urged by Plaintiff is that counterclaimant did not allege and prove that either she or Plaintiff were residents of Cook County, Illinois, at the time of the filing of the complaint for divorce or at the time of the filing of her counterclaim for separate maintenance. Prior to the amendment filed with the

Secretary of State on July 11, 1935, the Separate Maintenance Act (sec. 22, ch. 68, Ill. Rev. Stat. 1937) provided: (par. 22, ch. 68, Cahill's Ill. Rev. Stat., 1931) "That married women who, without their fault, now live or hereafter may live separate and apart from their husbands, may have their remedy in equity, in their own names respectively, against their said husbands in the Circuit Court of the county where the husband resides, for a reasonable support and maintenance while they so live or have so lived separate and apart; and in determining the amount to be allowed the court shall have reference to the condition in life of the parties at the place of residence of the husband, and the circumstances of the respective cases * * *;" and par. 23 (ch. 68 Cahill's Ill. Rev. Stat., 1931) stated that "Proceedings under this Act shall be instituted in the county where the husband resides, and process may be served in any county in the State * * *." Sec. 22, ch. 68 (Ill. Rev. Stat. 1937), as amended in 1935 reads: "That married men or women, who without their fault, now live or hereafter may live separate and apart from their wives or husbands, may have their remedy in equity, in their own names, respectively, against their said wives or husbands in the Circuit Court of the county where the wife or the husband resides, for a reasonable support and maintenance while they so live or have so lived separate and apart * * *." Sec. 23 was not amended. The effect of the 1935 amendment was to liberalize the law so as to give a married man a remedy by way of an action for separate maintenance in an appropriate case. The intent of the legislature is that when the wife sues the husband the complaint for separate maintenance shall be brought in the county where the husband resides. The question then arises as to whether, in the factual situation before us, plaintiff resided in Cook county, Illinois, at the time he filed his complaint or at the time counterclaimant filed her counterclaim. Here it may be noted that while at the commencement of the trial plain-

Supremacy of State on July 11, 1935, the separate maintenance Act (Sec. 22, ch. 63, Ill. Rev. Stat. 1937) provided (par. 22, ch. 63, Cahill's Ill. Rev. Stat. 1937) "That married women who, without their fault, now live or hereafter may live separate and

apart from their husbands, may have their remedy in equity, in their own names respectively, against their said husbands in the Circuit

Court of the county where the husband resides, for a reasonable support and maintenance while they so live or have so lived, separate

and apart; and in determining the amount to be allowed the court shall have reference to the condition in life of the parties at the time

of residence of the husband, and the circumstances of the respective parties * * *"; and par. 23 (ch. 63 Cahill's Ill. Rev. Stat., 1937)

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tiff resided in Cook county, Illinois, at the time he filed his complaint or at the time counteraffiant filed her counteraffidavit. Here it may be noted that while at the commencement of the trial plain-

tiff's solicitor stated to the court that Roy Smeck, the plaintiff, "finds that he is unable to prove that he has been an actual resident of the State of Illinois for the period of one year immediately before the filing of his bill for divorce;" he did not contend that his client was not an actual resident of Cook county at the time the complaint was filed. Counsel did not state that plaintiff was not a resident, but only that he could not prove that he was a resident. The complaint was filed and sworn to in the office of plaintiff's counsel. Plaintiff's counsel took the stand and testified that plaintiff told him that he had been a resident of Cook county at the time the complaint was filed, and that a friend of plaintiff came to the office and vouched for the statement of plaintiff that he was a resident of Cook county. This testimony is not contradicted. While the answer of defendant denies all the allegations of the complaint the counterclaim, praying for separate maintenance, averred that plaintiff was a resident of Cook county. Plaintiff's answer to the counterclaim admitted that he was a resident of Cook county. Therefore there is sufficient in the record to justify the action of the court in proceeding to decree.

Plaintiff points out that the decree does not find that either defendant or plaintiff was a resident of Cook county, Illinois. Par. (3), sec. 64, of the Civil Practice Act (sec. 188, ch. 110, Ill. Rev. Stat. 1937) provides that "No special findings of fact or certificate of evidence shall be necessary in any case in equity to support the decree." While the decree does not contain a specific finding that either plaintiff or counterclaimant was a resident of Cook county, Illinois, the pleadings and the testimony sufficiently establish that plaintiff was a resident of Cook county, Illinois. Furthermore, despite the objection of plaintiff's attorney, the chancellor entered the decree.

Plaintiff further argues that it was incumbent on the court to dismiss the complaint on plaintiff's motion, and that the dismissal

[illegible]

of the complaint would carry with it the counterclaim. He urges that where the original bill of complaint is dismissed for want of jurisdiction the counterclaim must follow the fate of the original bill. The last sentence of sec. 52 of the Civil Practice Act (sec. 176, ch. 110, Ill. Rev. Stat. 1937) states that "After a counterclaim has been pleaded by a defendant no dismissal may be had as to him except by consent of the defendant." Sec. 38 of the Civil Practice Act (sec. 162, ch. 110, Ill. Rev. Stat. 1937) contains a liberal provision for the filing of counterclaims, and sec. 44 of the same Act (sec. 168, ch. 110, Ill. Rev. Stat. 1937) contains similar liberal provisions for the joinder of actions by plaintiffs and for the joinder of cross-demands whether in the nature of recoupment, set-off, cross-bill in equity or otherwise, which are designated counterclaims; and also provides that the court may order separate trials of any causes of action or counterclaims "if they cannot be conveniently disposed of with the other issues in the case," and that legal or equitable issues may be tried together where no jury is employed. It follows that had the court allowed the dismissal of plaintiff's complaint such action would not affect the right of counterclaimant to maintain her counterclaim.

In considering this record it must be borne in mind that the counterclaimant asserted that plaintiff was a resident of Cook county, and in his answer to the counterclaim he admitted that he was a resident of Cook county. In his verified complaint he asserted that he was a resident of Cook county. A case that is quite illuminating on the proposition here involved is Sterl v. Sterl, 2 Ill. App. 223. Alexander Sterl filed his bill for divorce and affidavit of nonresidence, in the Superior court of Cook county. A default decree was entered, and at a subsequent term the defendant, Ellen F. Sterl, appeared, and on her petition the decree was opened up and she was allowed to answer and

of the complaint would carry with it the counterclaim. He urges that where the original bill of complaint is dismissed for want of jurisdiction the counterclaim must follow the fate of the original bill. The last sentence of sec. 38 of the Civil Practice Act (sec. 176, ch. 110, Ill. Rev. Stat. 1937) states that "After a counterclaim has been pleaded by a defendant no dismissal may be had as to him except by consent of the defendant." Sec. 38 of the Civil Practice Act (sec. 163, ch. 110, Ill. Rev. Stat. 1937) contains a liberal provision for the filing of counterclaims, and sec. 44 of the same Act (sec. 168, ch. 110, Ill. Rev. Stat. 1937) contains similar liberal provisions for the joinder of actions by plaintiffs and for the joinder of cross-demand, whether in the nature of recompense, set-off, cross-bill in equity or otherwise, which are designated counterclaims; and also provides that the court may order separate trials of any causes of action or counterclaims "if they can be conveniently disposed of with the other issues in the case," and that legal or equitable issues may be tried together where no jury is employed. It follows that had the court allowed the dismissal of plaintiff's complaint such action would not affect the right of counterclaim to maintain her counterclaim.

In considering this record it must be borne in mind that the counterclaim asserted that plaintiff was a resident of Cook county, and in his answer to the counterclaim he asserted that he was a resident of Cook county. In his verified complaint he asserted that he was a resident of Cook county. It is quite illuminating on the proposition here involved is Stear v. Stear, 2 Ill. App. 223. Alexander Stear filed his bill for divorce and affidavit of nonresidence, in the Superior court of Cook county. A default decree was entered, and as subsequent term the defendant, Ellen W. Stear, appeared, and on her petition the decree was opened up and she was allowed to answer and

defend the suit. She also filed a cross-bill for divorce and charged desertion and adultery. Defendant demurred to the cross-bill on the ground that it appeared from complainant's cross-bill that she did not reside in the State of Illinois for one year prior to the filing thereof. The demurrer was sustained and a decree was entered dismissing the cross-bill. The Appellate court reversed the decree and remanded the cause, saying (pp. 226-7):

"It is a familiar principle of law that a court of equity having acquired jurisdiction of the parties and of the subject matter of the suit will retain and exercise such jurisdiction, until the equities of all the parties are meted out to them. In this case the jurisdiction of the court is invoked by the appellee, he having as he had a legal right to do, filed his bill against appellant praying relief and summoning the appellant into the court. When she is thus brought in, and having responded to the claims of the appellee by answering his bill of complaint, being, as it were, then forced into the court, submits herself to its jurisdiction, and asks the court to grant to her certain equitable rights, to which she claims to be entitled, then it is that the appellee challenges the jurisdiction of the court to grant to her any equitable rights, but continues to clamor for his. This position is unconscionable and indefensible upon the principles of equity. But we are told, and it is urged by the appellee, that by reason of the arbitrary provisions of the statute, there is no escape from this dilemma, and that, as a consequence, the appellant is in the court for the purpose of receiving its mandate, and yielding obedience to its orders, but without any equitable rights which the appellee is bound to respect, for the reason, as he claims that she resided in New York, and not in Illinois, and notwithstanding she is dragged into the court, at the suit of appellee, and, as may be presumed, against her will. We think that by the plainest principles of equity the appellee is, under such circumstances, precluded from questioning the jurisdiction of a court which he has himself invoked; and that the court having acquired jurisdiction of the subject matter, and the parties to the suit, at the instance and by the prayer of the appellee, he cannot be heard to question the jurisdiction of the court to hear, consider and determine all the equities of the parties to the end that complete justice may be done to all in the same case."

Paraphrasing the language of the court in that case and applying it to the instant case, the plaintiff here is by the plainest principles of equity precluded from questioning the jurisdiction of the court which he has himself invoked. In Stewart v. Stewart, 231 Ill. App. 159, the court said (pp. 163-164):

"Complainant having filed her bill for divorce in which she alleged that she had been a resident for more than one year immediately preceding the filing of her bill and having brought defendant into court, she immediately invoked the aid of the court in an endeavor to make him pay alimony and solicitor's fees; having thus obtained the court's aid on her own motion she will not now be permitted to contend that the court had no jurisdiction. [Citing cases.]

defendant the suit. The bill was filed a cross-bill for divorce and charged desertion and adultery. Defendant demurred to the cross-bill on the ground that it was barred from complaint by the cross-bill that she did not reside in the State of Illinois for one year prior to the filing thereof. The demurrer was sustained and a decree was entered dismissing the cross-bill. The appellate court reversed the decree and remanded the cause, saying (p. 226-7):

"It is a familiar principle of law that a court of equity having acquired jurisdiction of the parties and of the subject matter of the suit will retain and exercise such jurisdiction until the equities of all the parties are stated out to them. In this case the jurisdiction of the court is invoked by the appellee, not having as he had a legal right to do, filed his bill against appellant praying relief and enforcement of the appellant into the court, when she is thus brought in, and having responded to the claim of the appellee by answering his bill of complaint, coming on its terms, then forced into the court, debate as to the jurisdiction, and the claims to be entitled, then it is that the appellee challenges the jurisdiction of the court to grant to him any equitable rights, which but continues to do for him. This position is untenable, and it is urged by the appellee, that by reason of the antient provisions of the statute, there is no legal divorce in Illinois, and that, as a consequence, the appellant is in the court for the purpose of receiving its mandate, and yielding obedience to its orders, but without any obstacle in the way of the appellee to its orders, but for the reason, as we claim, that she resided in New York, and not in Illinois, and notwithstanding she is brought into the court, and not the suit of appellee, and, as may be presumed, she is not to be thought that by the plaintiff's position of equity and law, he under such circumstances, provided from questioning the jurisdiction of a court which he has himself invoked; and that the court will acquire jurisdiction of the suit of the appellee, and that the court will acquit at the instance and by the answer of the appellee, the court be heard to question the jurisdiction of the court to do so, regardless and determine all the equities of the parties in the case, and complete justice may be done to all in the same case."

transcribing the language of the court in that case and by saying it to the instant case, too, which is by the highest of all courts of equity precluded from questioning the jurisdiction of the court which he has himself invoked. In Scott v. Scott, 221 Ill. 411, 159, the court said (p. 153-154):

"Complaint having been filed for divorce in which the alleged that she had been deserted for more than one year immediately preceding the filing of her bill and having placed defendant into court, the court will invoke its aid of law and equity in an endeavor to make him pay alimony and solicitor's fees; having thus obtained the court's aid on her own motion and will not be permitted to contend that the court had no jurisdiction."

It is the law in this State where one successfully invokes the jurisdiction of a court he is estopped from afterwards questioning its jurisdiction. It is also the law that where a bill for divorce is filed, showing jurisdiction, the defendant, although he may not be a resident of this State, may file a cross-bill and obtain a divorce if the evidence warrants it. Sterl v. Sterl, 2 Ill. App. 223; Newman v. Newman, 27 Okla. 381; Watkins v. Watkins, 135 Mass. 83; Clutton v. Clutton, 108 Mich. 267; Jenness v. Jenness, 24 Ind. 355. * * * In the instant case the original bill showing jurisdiction of the court, the defendant had a right to file a cross-bill and obtain a divorce if he could, without showing that he was a resident of the State. His action in this respect was a mere adjunct to the original proceeding."

Plaintiff also maintains that there is no proof of his earnings at his place of residence, and that the evidence does not warrant a decree for separate maintenance and does not authorize the provisions for alimony. The uncontradicted testimony establishes that plaintiff left counterclaimant because he was in love with another woman; that counterclaimant endeavored, unsuccessfully, to induce him to return to her; that her mother made a like effort; that counterclaimant was without fault, and that she exhausted the funds that she possessed at the time of the separation. Therefore there is ample competent evidence in the record to show that the counterclaimant was living separate and apart from plaintiff without any fault on her part.

As to whether the allowances for solicitors' fees and alimony were reasonable, the record shows that plaintiff had been in the theatrical business for fifteen years and received a salary of \$500 a week for his engagement in Detroit, \$600 a week in England, and that he received from \$350 upward while in this country; that he also receives royalties; that at the time of the separation counterclaimant received \$6,000 and plaintiff \$12,000, and that she had exhausted her funds. Plaintiff does not earn his salary at the place of his residence but travels from city to city as his engagements are booked. At the conclusion of the hearing the chancellor stated that he would order plaintiff to pay \$50 a week "if his income runs from \$350 up." The decree in fact provided that he pay \$50 a week until the further

order of the court. We are of the opinion that the order for alimony and solicitors' fees is supported ^{by} the record. We observe that this appeal was filed and is prosecuted by plaintiff while he is virtually a fugitive from the writ of attachment issued by one of our courts.

A final point urged by plaintiff is that the order for the body attachment is void. He contends that it is necessary to serve a rule on the plaintiff before an attachment may issue. The usual and approved practice is to first serve a rule. But where the respondent stands in defiance of the court and remains concealed or out of the jurisdiction, an attachment may issue in the first instance. If plaintiff surrenders to the sheriff or if the attachment is executed the Superior court of Cook county will proceed according to the law of the land. Plaintiff will then have his day in court to the same extent as if a rule had been served. Should plaintiff offer to do equity and show his good faith in endeavoring to comply with the decree he may petition the court for a reduction in future instalments of alimony.

A thorough consideration of the entire record and of the points raised by plaintiff convinces us that the action of the court was proper. Therefore, the decree of the Superior court of Cook county and the order for the writ of attachment are affirmed.

DECREE AND ORDER AFFIRMED.

Sullivan and Friend, JJ., concur.

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country and the other for the benefit of settlement was confirmed. Therefore, the decree of the Superior Court of Utah was proper. Plaintiff's contention that the action of the court was proper in awarding the entire tract and of the

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PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

v.

GEORGE KAPPOS, alias GEORGE KAPOS,
Plaintiff in Error.

27A
ERROR TO MUNICIPAL COURT
OF CHICAGO.

298 I.A. 625⁵

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On March 22, 1938, The People filed, in the Municipal court of Chicago, an information charging that defendant, on March 3, 1938, unlawfully, knowingly and wilfully encouraged Walter Pijanowski, a male person of the age of sixteen years, to become a delinquent child, contrary to the form of the statute in such case made and provided. Defendant entered a plea of not guilty and the cause was tried with a jury. The following verdict was returned: "We, the jury, find the defendant, George Kappos, alias George Kapos, guilty in manner and form as charged in the information, with a recommendation for punishment in the form of a fine." Motions for a new trial and in arrest of judgment were overruled and judgment was entered on the verdict. Thereupon the court sentenced defendant to confinement in the House of Correction in the city of Chicago for a term of one year and to pay a fine of one dollar. The case comes here in response to a writ of error.

Defendant brought up only the common law record. His first contention is that the verdict does not find the age of Walter Pijanowski. The jury returned a general verdict finding the defendant guilty in manner and form as charged in the information. Such a verdict is valid and necessarily found that the People had proved beyond a reasonable doubt that the boy was sixteen years of age. A special finding as to the boy's age was unnecessary. Defendant does not make any point that the information did not properly and sufficiently charge him with the offense.

TO THE CLERK OF THE COURT

OF THE CITY OF CHICAGO

2981.A.655

PROBATION DEPARTMENT OF THE CITY OF CHICAGO
Defendant in Error,
v.
GEORGE LAPPOS, alias GEORGE LAPPOS,
Plaintiff in Error.

MR. PRESIDING JUSTICE LEARN BOWMAN AND MR. JUSTICE OF THE COURT.

On March 26, 1938, the case was filed in the municipal court of Chicago, an information charging that defendant, on March 6, 1938, unlawfully, knowingly and willfully associated with Ryszewski, a male person of the age of sixteen years, to become a defendant child, contrary to the term of the statute in such case made and provided. Defendant entered a plea of not guilty and the case was tried with a jury. The following verdict was returned: "e, the jury, find the defendant, George Lappos, alias GEORGE LAPPOS, guilty in manner and form as charged in the information, with a recommendation for punishment in the term of a fine." Motions for a new trial and in arrest of judgment were overruled and judgment was entered on the verdict. Thereupon the court sentenced defendant to confinement in the house of correction in the city of Chicago for a term of one year and to pay a fine of one dollar. The case comes here in response to a writ of error.

Defendant brought up only one ground for error. His first contention is that the verdict does not find the age of Ryszewski. The jury returned a general verdict finding the defendant guilty in manner and form as charged in the information. Such a verdict is valid and necessarily found that the people had proved beyond a reasonable doubt that the boy was sixteen years of age. A special finding as to the boy's age was unnecessary. Defendant does not make any point that the information did not properly and sufficiently charge him with the offense.

As a second point defendant argues that the sentence is excessive. The sentence is authorized by the statute defining the crime. As the testimony introduced is not before us we are not in a position to determine whether the trial judge abused his discretion. We assume that the court acted with due regard for the rights of the People and the defendant. If defendant desired to have the evidence reviewed the burden was on him to bring the transcript before us.

A third point argued by defendant is that the court should have followed the recommendation of the jury that defendant be punished by the imposition of a fine. Sections 756 and 757, ch. 38, Ill. Rev. Stat. 1937, provide:

"[756] When the punishment may be either by imprisonment in the penitentiary, or by confinement in the county jail, with or without fine, if the jury will not inflict the punishment of imprisonment in the penitentiary, they shall simply find the accused guilty, and the court shall fix the time of confinement in the jail, or fine, or both, as the case may require.

"[757] When the accused pleads guilty, and in all other cases not otherwise provided for, the court shall fix the time of confinement, or the amount of the fine, or both, as the case may require."

These sections, considered in connection with sections 801 to 804, inclusive (ch. 38, Ill. Rev. Stat. 1937), show that in the instant case the duty of determining the punishment was on the court. The recommendation of the jury was gratuitous and not responsive to the issues, and the court was justified in disregarding it.

Finally, defendant argues that he was apprehended "without legal process of any kind," and that within a week after his arraignment he was placed on trial. It does not appear that in the trial court the defendant raised any objection as to the manner of his apprehension, or that he sought a continuance, or that his right to a fair trial was prejudiced.

An examination of the record submitted to us and of the points and authorities urged, does not disclose that the court committed any error. Therefore the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

As a second point defendant argues that the sentence is excessive. The sentence is not fixed by the statute defining the crime. As the testimony introduced is not sufficient to establish a position to determine whether the trial judge abused his discretion. We assume that the court acted properly in sentencing the defendant. It is not necessary for us to review the evidence reviewed the burden was on the defendant to prove the facts before us.

A third point argued by defendant is that the court should have followed the recommendation of the jury that defendant be punished by the imposition of a fine. Section 702, Ill. C.S., 1927, provides:

"[755] When the defendant may be either be imprisoned in the penitentiary, or by confinement in the county jail, with or without time, in the jury will not limit the punishment to the penitentiary, they shall signify their recommendation in the jury, and the court shall fix the time of confinement in the jail, or time, or both, as the case may require.

"[757] When the accused pleads guilty, and in all other cases not otherwise provided for, the court shall fix the time of confinement, or the amount of the fine, or both, as the case may require."

These sections, considered in connection with sections 701 to 704, inclusive (Ch. 38, Ill. Rev. Stat. 1927), show that in the instant case the duty of determining the punishment was on the court. The recommendation of the jury was advisory and not res omissive to the court, and the court was justified in disregarding it.

Finally, defendant argues that he was sentenced "without legal process of any kind," and that it is a week after his arraignment he was placed on trial. It does not appear that in the trial court the defendant raised any objection as to the manner of his arraignment, or that he sought a continuance, or that his right to a fair trial was prejudiced.

An examination of the record submitted to us in support of the points and authorities urged, does not disclose that the court committed any error. Therefore the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

40089

WM. E. SALOMON AND CO.,
a corporation,

Appellant,

v.

GLOBE INDEMNITY CO., a
corporation,

Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

298 I.A. 626¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Globe Indemnity Company, defendant herein, insured Wm. E. Salomon and Co., plaintiff, under a policy known as "Standard Workmen's Compensation and Employers Liability Policy." Steven Kravarik, one of plaintiff's employees, claimed injuries resulting from an occupational disease, incurred during the course of his employment. Plaintiff notified the insurance company, which replied that occupational diseases were not covered by the policy. Thereupon Kravarik brought suit and summons served upon plaintiff was forwarded to the insurance company, which refused to defend plaintiff, unconditionally. Thereupon plaintiff hired its own counsel, who effected a settlement for \$1,350. In addition to this amount plaintiff incurred \$350 for attorneys' fees and an item of \$40 for investigation and medical expense. Upon demand made by plaintiff, the insurance company refused to pay, and suit was instituted. Trial was had by the court without a jury, resulting in a finding and judgment in favor of defendant, and this appeal followed.

The sole question presented is whether paragraphs I (b) and VII of the policy can be so construed as to afford indemnity to plaintiff for an occupational disease incurred by one of its employees in the course of his employment. The controversy centers around the following provisions of the policy:

"Standard Workmen's Compensation and
Employers' Liability Policy

GLOBE INDEMNITY COMPANY
(Herein called the Company)

Does Hereby Agree with this Employer, named and described as such in the Declarations forming a part hereof, as respects personal injuries sustained by employees, including death at any time resulting therefrom as follows:

I. (b) To Indemnify this Employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America. In the event of the bankruptcy or insolvency of this Employer the Company shall not be relieved from the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency. If, because of such bankruptcy or insolvency, an execution against this Employer is return unsatisfied in an action brought by the injured, or by another person claiming by, through or under the injured, then an action may be maintained by the injured, or by such other person claiming by, through or under the injured, against the Company under the terms of this Policy for the amount of the judgment in said action not exceeding the amount of this Policy. ***

VII. This agreement shall apply only to such injuries so sustained by reason of accidents occurring during the policy period limited and defined as such in Item 2 of said declarations." (Item 2 simply states the period within which the policy is to remain in force.)

The gravamen of plaintiff's contention is that under the provisions of paragraph I (b) personal injuries include those incurred through occupational diseases, and that paragraph VII should be read as referring to "occurrences" and "incidents", rather than "accidents," as provided in the policy.

In Belleville Enamelling and Stamping Co. v. United States Casualty Company, 266 Ill. App. 586, the Appellate court for the fourth district, and we in the case of Brodek v. Indemnity Insurance Co. of North America, 292 Ill. App. 363, had occasion to construe policies containing the identical provisions, and it was held in both instances that the provisions of the policy did not cover injuries resulting from occupational diseases. Plaintiff's counsel concedes that the Belleville case is in point, but argues that we are not bound to and ought not to follow the reasons and conclusions there reached. The same question was presented in that case, however, and certiorari

"...to a... of... and
...policy..."

...
(...the company)

Does hereby agree with this... and described as such
in the... of...
injuries sustained by employees, including... as only time re-
sulting therefrom as follows:

1. (p) In... the... against loss by reason
of the liability imposed upon him by law for damages on account of
such injuries to such... as was legally employed
wherever such injuries may be sustained within the territorial
limits of the United States of America. In the event of the
bankruptcy or insolvency of this... the Company shall not be
relieved from the payment of such liability... because of
such bankruptcy or insolvency, an action against this...
is return... in an action brought by the injured, or by
another person claiming by, through or under the injured, when an
action may be maintained by the injured, or by such other person
claiming by, through or under the injured, against the Company under
the terms of this Policy for the amount of the benefit in such
action not exceeding the limit of this Policy.

XVI. This... shall apply only to such injuries as
sustained by reason of... during the policy period
limited and defined as... (Item
& simply states the period... which the policy is to remain in
force.)

The... of... under the
provisions of... (p) personal injuries... those incurred
through occupational diseases, and... VII should be read
as referring to "occupational diseases" and "injuries", rather than "accidents",
as provided in the policy.

In... and...
... the... for the
fourth district, and as in the case of...
... of North...
policies containing the identical provisions, and it was held in both
instances that the provisions of the policy did not cover injuries
resulting from occupational diseases. ...
that the... case is in point, but argues that we are not bound
to and ought not to follow the reasons and conclusions there reached.
The same question was presented in that case, however, and certainly

was denied by the Supreme court. In the Brodek case we were called upon to determine whether injuries resulting from an occupational disease were covered by a policy identical in form, and in a rather lengthy opinion we reviewed all of the cases that had been called to our attention, including the Belleville case, and concluded that this form of policy does not cover occupational diseases. Plaintiff filed a petition in the Supreme court for leave to appeal, which was denied.

Plaintiff's counsel cites four cases in support of the only point made, namely, that "the court erred in finding for the defendant, because an occupational injury was covered by the express terms of the policy." Three of these cases were decided in other states. The opinion in the fourth case, Heineman Corp. v. Standard Surety, 289 Ill. App. 358, was filed by the third division of this court. We pointed out in the Brodek case, however, that the Heineman case was readily distinguishable, for the reason that there was attached to the policy a rider which specifically covered occupational diseases. This does not appear from the opinion, but the record clearly so indicates.

Although other states have held to the contrary, the decisions in this state are all adverse to plaintiff's contention, and hold that this policy covers only personal injuries resulting from accident, and since the injury complained of is not the result of an accident, but rather an occupational disease, plaintiff is not entitled to recover. Our views as to the construction of this policy are set forth at length in Brodek v. Indemnity Co., supra. Since the Supreme court has twice refused to review appellate court decisions holding that occupational diseases are not covered by policies identical in form, we think it would serve no useful purpose to again discuss at length the provisions of the policy and our views in support of the construction that we have already placed upon it. Therefore, the judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

Burke, P. J., and Sullivan, J., concur.

was denied by the Supreme Court. The Federal case was

called upon to determine the law applicable to the

occupational diseases were covered by a policy in force

and in a recent majority opinion we reviewed all of the cases that

had been called to our attention, including the Waller case,

and concluded that this form of policy does not cover occupational

diseases. Plaintiff filed a petition in the Superior Court for

leave to appeal, which was denied.

Plaintiff's counsel cited four cases in support of the only

point made, namely, that "the court erred in holding for the de-

fendant, because an occupational injury was covered by the express

terms of the policy." Three of these cases were decided in other

states. The opinion in the fourth case, Heineman Corp. v. Standard

Ins. Co., 238 Ill. 408, 98 Ill. App. 388, was filed by the third division of this

court. It pointed out in the Heineman case, however, that the

Heineman case was really distinguishable, for the reason that

there was attached to the policy a rider which specifically covered

occupational diseases. This case was removed from the opinion, but

the record clearly so indicates.

Although other states have held to the contrary, the distinction

in this state are all adverse to plaintiff's contention, and hold that

this policy covers only personal injuries resulting from accidents, and

since the injury complained of is not the result of an accident, but

rather an occupational disease, plaintiff is not entitled to recover.

Our views as to the construction of this policy are set forth at

length in Brooks v. Industrial Ins. Co., 238 Ill. 408, 98 Ill. App. 388.

has twice refused to review appellate court decisions holding that

occupational diseases are not covered by policies identical in form,

we think it would serve no useful purpose to again discuss at length

the provision of the policy and our views in support of the con-

40141

ADELAIDE M. THOMASON,
Appellee,

v.

CHICAGO MOTOR COACH COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

298 I.A. 626²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Adelaide M. Thomason, plaintiff, sued to recover damages for injuries sustained while alighting from one of defendant's motor coaches. Defendant's motions for a directed verdict, made at the close of plaintiff's evidence and also at the close of all the evidence, were overruled. The jury returned a verdict for \$2,500. Thereupon further motions for judgment notwithstanding the verdict, for a new trial, and in arrest of judgment were all overruled, and judgment was entered on the verdict. Defendant appeals.

This is the third appeal of this case. In the second appeal (292 Ill. App. 104) we reversed a judgment in favor of defendant, entered on a directed verdict at the close of plaintiff's case, and remanded the cause generally for a new trial.

The pleadings and facts of the case are set forth in our former opinion. However, a brief recital of the circumstances which led to the accident may be made, as follows: Plaintiff was injured shortly before 7 o'clock on the evening of November 22, 1933, as she was alighting from defendant's motor coach at the northeast corner of the intersection of Sheridan road and Lawrence avenue, Chicago. She was 64 years of age, about 5 feet,

APPEAL

ADAMANT M. THOMASON,
Appellee,

v.

CHICAGO MOTOR COACH COMPANY,
a corporation,
Plaintiff.

IN THE COURT OF THE CITY OF CHICAGO

DOCKET NO. 100,000

3981 A. 686

MR. JUSTICE VANDERBILT, THE CHIEF OF THE COURT.

Adelaide M. Thomason, Plaintiff, sued to recover damages

for injuries sustained while riding from one of defendant's motor coaches. Defendant's motion for a directed verdict, made at the close of plaintiff's evidence and also at the close of all the evidence, were overruled. The jury returned a verdict for \$2,500. Thereupon further motion for judgment notwithstanding the verdict, for a new trial, and in arrest of judgment were all overruled, and judgment was entered on the verdict. Plaintiff appeals.

This is the third appeal of this case. In the second

appeal (303 Ill. App. 104) we reversed a judgment in favor of defendant, entered on a directed verdict at the close of plaintiff's case, and remanded the case for a new trial.

The pleadings and facts of the case are set forth in our former opinion. However, a brief recital of the circumstances which led to the accident may be made, as follows: Plaintiff was injured shortly before 7 o'clock on the evening of November 22, 1933, as she was riding from defendant's motor coach at the northeast corner of the intersection of Madison road and Lawrence avenue, Chicago. She was 6 years of age, about 5 feet

3-1/2 inches tall, and weighed approximately 225 pounds. She was proceeding with her niece, Mrs. Jean R. Thomason, to the Peoples Church at 941 Lawrence avenue. The coach, on route No. 53, proceeded north on Sheridan road and stopped at Lawrence avenue, where plaintiff and her niece alighted, near the corner. It appears from the agreement of the parties that the coach in question was a double-decked, fully enclosed motor coach, with the entrance in front, equipped with a vertical handrail, set about 2 inches on the inside of the coach and about 6 inches on the outside, as you get out of the coach; that on the left side there was a handrail, which curved around at a height of about 4 feet down to the floor at the edge of the step, a distance of 17 or 18 inches from the outside edge of the step. The driver, or motorman, was stationed at the left of the entrance. There was no conductor. The height of the step of the coach was about 16 inches to 18 inches from the pavement, and plaintiff testified that she had ridden on this type of coach before and knew its construction. It appears from the evidence that when the coach pulled up to the curb at the northeast corner of Sheridan and Lawrence, its course was slanting to the northeast, with the rear nearer the curb and the front step about 2 feet from the curb. The coach came to a complete stop and remained standing until after both plaintiff and her niece had alighted.

Plaintiff testified that when the coach came to a stop she proceeded to the exit door and stepped down on the step with her left foot, followed by her right foot, grasped the right railing and looked to see which way she should get off the bus; that she observed the rear of the coach close to the curb and the front about a foot farther away; that the step appeared to be about 2 feet from the curb, and it seemed to her to be safe to step to the curb; that she

3-1/2 inches tall, and weighed approximately 250 pounds. He was proceeding with her niece, Mrs. John W. Thompson, to the Peoples Church at 941 Lawrence Avenue. The coach, on route No. 53, proceeded north on Sheridan Road and stopped at Lawrence Avenue, where plaintiff and her niece alighted, near the corner. It appears from the agreement of the parties that the coach in question was a double-decked, fully enclosed motor coach, with the entrance in front, equipped with a vertical handrail, set about 2 inches on the inside of the coach and about 6 inches on the outside, as you get out of the coach; that on the left side there was a handrail, which curved around at a height of about 4 feet down to the floor at the edge of the step, a distance of 14 or 15 inches from the outside edge of the step. The driver, or motorman, was stationed at the left of the entrance. There was no conductor. The height of the step of the coach was about 16 inches to 18 inches from the pavement, and plaintiff testified that she had ridden on this type of coach before and knew its construction. It appears from the evidence that when the coach pulled up to the curb at the northeast corner of Sheridan and Lawrence, its course was alighting to the northeast, with the rear nearer the curb and the front step about 2 feet from the curb. The coach came to a complete stop and remained standing until after both plaintiff and her niece had alighted.

Plaintiff testified that when the coach came to a stop she proceeded to the exit door and stepped down on the step with her left foot, followed by her right foot, grasped the right railing and looked to see which way she should get off the bus; that she observed the rear of the coach close to the curb and the front about a foot farther away; that the step appeared to be about 2 feet from the curb, and it seemed to her to be safe to step to the curb; that she

decided to step to the curb with her left foot, "but didn't quite make it," and her foot slipped back quickly, causing the injury. Plaintiff also testified that she knew her niece was getting off behind her and that it was necessary for her to get out of the way before her niece could step down.

Jean R. Thompson testified that she observed her aunt alighting, and followed her in stepping from the bus to the curb. She had to wait until plaintiff got off the step before she could alight, and during all that time the coach was standing and did not proceed until both passengers had alighted. The witness did not see anything happen to plaintiff, and did not know she was hurt until plaintiff told her. Neither one said anything to the driver at the time. So far as defendant is concerned, it was a "blind case".

It is urged on behalf of plaintiff that the questions of negligence and contributory negligence have been considered and passed upon by this court in a former opinion and are therefore res judicata. While ordinarily a question considered and determined on a prior appeal is deemed settled and not open to re-examination on a second appeal, this is not an inflexible rule, and if the prior decision is palpably erroneous it is not only competent for the court to correct it on second appeal, but it is its duty to do so. In Awotin v. Atlas Exchange National Bank, 275 Ill. App. 530, the contention was made by counsel for plaintiff that the decision on the former appeal was binding upon this court on a subsequent writ of error, and that under the rule or doctrine of the "law of the case" the judgment should be affirmed. We concluded, that the better rule, and one more in accord with justice, is that although ordinarily a question considered and determined on the first appeal is deemed to be settled and not open to re-examination on second appeal, "it is not an inflexible rule, and if the prior decision is palpably erroneous it is competent for the

decided to step to the curb with her left foot, "but didn't quite make it," and her foot slipped back slightly, causing the injury. Plaintiff also testified that she knew her niece was standing off behind her and that it was necessary for her to get out of the way before her niece could step down.

John H. Thompson testified that she observed her aunt alighting, and followed her in stepping from the bus to the curb. She had to wait until Plaintiff got off the step before she could alight, and during all that time the coach was standing and did not proceed until both passengers had alighted. The witness did not see anything happen to Plaintiff, and did not know she was hurt until Plaintiff told her. Neither one said anything to the driver at the time. So far as defendant is concerned, it was a "filing case".

It is urged on behalf of Plaintiff that the question of negligence and contributory negligence have been considered and passed upon by this court in a former opinion and the therefore was foreclosed.

While ordinarily a question considered and determined on a first appeal is deemed settled and not open to re-examination on a second appeal, this is not an inflexible rule, and if the prior decision is palpably erroneous it is not only competent for the court to correct it on second appeal, but it is its duty to do so. In Booth v. Glass Exchange National Bank, 275 Ill. 330, the contention was made by counsel for Plaintiff that the decision on the former appeal was binding upon this court on a subsequent writ of error, and that under the rule or doctrine of the "law of the case" the judgment should be affirmed. It is contended, that the better rule, and one more in accord with justice, is that although ordinarily a question considered and determined on the first appeal is deemed to be settled and not open to re-examination on second appeal, "it is not an inflexible rule, and if the prior decision is palpably erroneous it is competent for the

court to correct it on the second appeal. This may be said to be the view which has for its support the trend of modern authority, ***."

Likewise, in Zerulla v. Supreme Lodge, 223 Ill. 518, the court recognized the general rule that on second appeal matters disposed of on a former appeal would ordinarily not again be considered, but this rule was held to be "not an inexorable one, and should not be adhered to in a case in which the courts have committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society."

The facts of the case relating to the question of plaintiff's case are undisputed. It is urged by defendant that plaintiff did not exercise ordinary care and prudence for her own safety, but deliberately attempted to step to the curb, and that, knowing her age, height and lack of ordinary agility, she was bound to use care commensurate with these infirmities. The question of ordinary care in this case must be determined from plaintiff's own testimony. If the space of 2 feet between the step and the curb presented a danger which was obvious to defendant, it was likewise obvious to plaintiff, and required some watchfulness on her part in alighting. She evidently proceeds on the theory that she was deceived and misled by the distance, for she testified that she looked to see which way she should get off, then stepped toward the curb, but "didn't quite make it." Neither her act nor her decision was prompted by any suggestion or direction of defendant's driver; she acted on her own judgment, which was that the best way to get off was to step to the curb, and if her age, stature, weight and lack of agility limited the length of the step she could safely attempt, these factors were known to her and unknown to defendant. Knowing all of these things, she looked and

court to correct it on the second appeal. This may be said to be the view which has for its support the trend of modern authority.

***"

likewise, in Arncliffe v. Lawrence, 223 Ill. 518, the

court recognized the general rule that on a second appeal matters disposed of on a former appeal could ordinarily not again be considered, but this rule was held to be "not an inflexible one, and should not be adhered to in a case in which the courts have committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society."

The facts of the case relating to the question of plaintiff's case are undisputed. It is urged by defendant that plaintiff did not exercise ordinary care and prudence for her own safety, but deliberately attempted to step to the curb, and that, knowing her age, height and lack of ordinary ability, she was bound to use some commensurate with these infirmities. The question of ordinary care in this case must be determined from plaintiff's own testimony. At the time of 2 feet between the step and the curb presented a danger which was obvious to defendant, it was likewise obvious to plaintiff, and defendant some witnesses on her part in eliciting. The evidence proceeds on the theory that she was deceived and misled by the distance, for the testimony that she looked to the curb and then stepped off, then stepped over the curb, but "didn't quite make it." Neither her act nor her decision was prompted by any suggestion or direction of defendant's driver; she acted on her own judgment, which was that the best way to get off was to step to the curb, and if her age, stature, weight and lack of ability limited the length of the step she could safely attempt, these factors were known to her and unknown to defendant. Knowing all of these things, she looked and

considered what to do and made her decision and evidently her injury was proximately and directly caused by her own judgment and not by any acts on the part of plaintiff's agent. It has been consistently held that if a passenger, in alighting, has as good an opportunity to see and observe conditions as the carrier's servants, and knows that conditions are dangerous in case he or she attempts to alight under such conditions, contributory negligence exists. (Feeney v. Chicago City Ry. Co., 220 Ill. App. 400; Hudnut v. Indiana De Luxe Cab Co., (Ind. App.) 182 N. E. 711; Kingsley v. D. L. & W. R. Co., (N.J.) 80 Atl. 327). Inasmuch as plaintiff alleged in her statement of claim that in alighting she was in the exercise of such due care and caution for her own safety as under the circumstances could be reasonably expected, it was incumbent upon her to prove this allegation by competent evidence. After a careful review of the record we are impelled to hold, contrary to the view heretofore expressed, that plaintiff's evidence, viewed in its most favorable aspect, fails to establish due care on her part, as a matter of law.

Plaintiff's counsel argues the facts as though plaintiff in alighting was acting in an emergency, which excused her from using good judgment. This argument is untenable, because the coach was standing still and plaintiff knew that her niece was behind her, and that the coach would not proceed until her niece had also alighted. Under the circumstances, cases dealing with the conduct of persons during emergency, and when confronted by "sudden peril," are not applicable, and would not absolve plaintiff from using due care and caution for her own safety under the circumstances of this case. It is also urged that plaintiff's decision to step to the curb rather than to the pavement was prompted by the fact that the rear end of the bus was closer to the curb, and that she feared that it might strike or "side swipe" her after it started up. Plaintiff knew that

her niece was behind her, and that the bus would not proceed until both passengers had alighted, and presumably she would have had ample time, if she had so decided, to first step to the street and then to the curb, before her niece alighted and the bus could get under way.

The acts of negligence charged to defendant are two-fold, - (1) failure of defendant to have its coach equipped with a convenient handrail on the left side of the exit door, and having a step of unusual, inconvenient and dangerous height; and (2) operation of the coach, in failing to have a guard to assist plaintiff in stepping from the bus. As to the first contention, the construction of the bus is sufficiently described in our former opinion and in the summary of facts herein. Included in the evidence introduced by defendant on the third trial, which was absent in the former hearing, was the testimony of H. V. Johansen, technical field service representative for the Yellow Truck & Coach Mfg. Co., Bus Division of General Motors, who stated that he was familiar with this type of coach, which had been in operation in New York, Chicago, Boston, Worcester and Los Angeles. There is no allegation that the coach was not of an approved and well known type, in general use by similar carriers, but only that it was in common use in the city of Chicago. The rule is well settled that a carrier discharges its obligation when it provides such means of transportation as are adapted to the reasonably safe carriage of passengers upon the particular type of conveyance used, and the test frequently invoked is whether the carrier has provided vehicles and appliances as are of the most approved type in general use by other carriers engaged in the same or similar modes of transportation. (Lafflin v. Buffalo & S. W. R. Co., 106 N. Y. 14; Grubczak v. Chicago Railways Co., 242 Ill. App. 384, and cases cited therein.) No effort was made on behalf of plaintiff to show by expert or other testimony that the construction and equipment of this coach was not of an approved type, or that other accidents of a similar nature had ever

her niece was behind her, and that the bus could not proceed until both passengers had alighted, and presumably the woman had time to time, if she had no decided, to alight step to the street. When the curb, before her niece alighted, the bus could not proceed. The state of affairs changed to defend at the trial.

(1) Failure of defendant to have the coach equipped with a convenient handrail on the left side of the exit door, and having a step of

unusual, inconvenient and dangerous height; and (2) operation of the coach, in failing to have a guard to ensure alighting in stepping from the bus. As to the first contention, the construction of the bus is

adequately described in our former opinion and in the summary of facts herein. Included in the evidence introduced by defendant on

the third trial, which was absent in the former hearing, was the testimony of H. V. Johnson, technical state service representative

for the Yellow Truck & Coach Co., Inc., Division of General Motors, who stated that he was familiar with this type of coach, which had

been in operation in New York, Chicago, Boston, Worcester and New

Hampshire. There is no allegation that the coach was not of an approved and well known type, in general use by similar carriers, but only that

it was in common use in the city of Chicago. The rule is well settled that a carrier discharges its obligation when it provides such means

of transportation as are adapted to the reasonably safe carriage of passengers upon the particular type of conveyance used, and the test

frequently invoked is whether the carrier has provided vehicles and appliances as safe as the most approved type in general use by other

carriers engaged in the same or similar modes of transportation. (Illinois v. Chicago & North Western Ry. Co., 108 U.S. 151; Chicago & North Western Ry. Co. v. Chicago)

No effort was made on behalf of plaintiff to show expert or other testimony that the construction and equipment of this coach was not of an

approved type, or that other accidents of a similar nature had ever

occurred. Johansen stated that this type of coach had been in operation since 1929, and that he never knew of anybody falling on account of the height of the step. Moreover, plaintiff alleged and testified that she had ridden on this type of bus many times and knew when she boarded it that there was no conductor. Ordinarily it is not part of the duty of the employees of a common carrier to assist passengers in alighting, and such duty arises only when the circumstances are such as to suggest the necessity of assistance. It was so held in Burge v. St. L. S. & P. R. R., 193 Ill. App. 492, wherein the court said (p. 494): "The rule is universal that ordinarily there is no duty resting on a carrier of passengers to assist a passenger in boarding or alighting from its train or car." Cases cited in the foregoing decision abundantly support this rule.

It is urged as additional ground for reversal that the court erroneously permitted plaintiff to state her reasons for stepping from the coach to the curb, instead of first stepping to the pavement. Her answer to this interrogatory was as follows: "Because of the position of the bus, and not being agile on my feet, I decided - it seemed a dangerous thing to do, that the hind wheels might brush against me or hit me." Defendant's motion to strike the answer was overruled. Defendant's counsel argue with considerable force that plaintiff's attorney thus elicited from her an opinion and conclusion as to what she could or could not safely do under the circumstances, which was the very question of fact to be submitted to the jury, and that it was clearly incompetent and prejudicial to the defendant to allow plaintiff to state her reasons for her decision. In People v. Adams, 289 Ill. 339, it was held that witnesses should testify to actual facts, and should not be permitted to give conclusions as to what could or could not have been done safely under the circumstances, and the rule is also well settled that a witness cannot be permitted to testify as to the very fact which the jury is to determine (I.C.R.R.

Co. v. Smith, 208 Ill. 608; Shaughnessy v. Holt, 236 Ill. 485), nor to the degree of care he used when he was injured. (City of Springfield v. Coe, 166 Ill. 22.)

After a careful re-examination of plaintiff's evidence, we have reached the conclusion that our former opinion would result in injustice to defendant. Since there is no dispute as to the facts, the question whether plaintiff was in the exercise of due care for her own safety, when considered upon the record in its aspects most favorable to plaintiff, becomes one of law, and notwithstanding the conclusions reached in our former opinion we think there is no theory of law upon which judgment in favor of plaintiff can be sustained, inasmuch as the verdict is against the law and the evidence. Therefore, it will serve no useful purpose to have the case tried a fourth time, and accordingly the judgment of the Municipal court is reversed as a matter of law, without remanding the cause for another trial.

JUDGMENT REVERSED.

Burke, P. J., and Sullivan, J., concur.

Co. v. Smith, 208 Ill. 608; Hanbury v. Wolf, 206 Ill. 403,
nor to the degree of care he used when he was injured. (City of
Springfield v. Coe, 166 Ill. 28.)

After a careful re-examination of plaintiff's evidence,
 we have reached the conclusion that our former opinion would result
 in injustice to defendant. Since there is no dispute as to the
 facts, the question whether plaintiff was in the exercise of due
 care for her own safety, when compared with the reason for the
 aspects most favorable to plaintiff, becomes one of law, and not
 of fact. Withstanding the conclusions reached in our former opinion we think
 there is no theory of law upon which judgment in favor of plaintiff
 can be sustained, inasmuch as the verdict is against the law and
 the evidence. Therefore, it will serve no useful purpose to have
 the case tried a fourth time, and accordingly the judgment of the
 Municipal court is reversed as a matter of law, without remanding
 the cause for another trial.

THE COURT: V. J. J.

Burke, J. J., and Sullivan, J., concur.

40163

UNITED STATES CASUALTY COMPANY,
a corporation,

Appellant.

v.

PEARL SABICH et al.,
Defendants below.

WENTWORTH BUILDING AND LOAN
ASSOCIATION, a corporation, et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

298 I.A. 626³

MR. JUSTICE FRIMM DELIVERED THE OPINION OF THE COURT.

United States Casualty Company, filed its complaint to foreclose a trust deed securing a note for \$3,500, under the terms of an agreement made by Wentworth Building and Loan Association, defendant, with the mortgagors, Pearl and Steve Sabich, which provided that in the event of foreclosure of either an \$8,000 mortgage or plaintiff's \$3,500 trust deed, conveying the same premises, both loans would be on a parity and share without priority in the proceeds of the sale. Plaintiff's complaint was brought for the equal benefit of itself and the defendant, Wentworth Building and Loan Association. The latter filed its counterclaim to foreclose its \$8,000 mortgage as a prior and superior lien to plaintiff's, on the theory that its agreement of October 2, 1930, was without consideration, beyond its corporate power, ultra vires and invalid. The master to whom the cause was referred on both the complaint and counterclaim, found the agreement of October 2, 1930, valid and the lien of plaintiff's trust deed on a parity with the association's mortgage, and recommended a decree in favor of plaintiff. The chancellor, however, sustained the exceptions of Wentworth Building & Loan Association, and entered

UNITED STATES OF AMERICA
a corporation,
Applicant,

v.

THE ASSOCIATION OF
BANKERS OF AMERICA
Defendants below.

IN SENATE
COURT, DISTRICT OF COLUMBIA.

9921A.628

WESTWORTH BUILDING AND LOAN
ASSOCIATION, a corporation,
Appellee.

MR. JUSTICE FRANKLIN DELIVERED THE OPINION OF THE COURT.

United States Circuit Court of Appeals for the District of Columbia affirmed the decree of the District Court in favor of the Westworth Building and Loan Association, defendant, with the modification that the mortgage be set aside in the event of foreclosure of which on \$2,500 mortgage on plaintiff's \$3,500 first deed, conveying the same premises, both loans would be on a parity and that without priority in the proceeds of the sale. Plaintiff's complaint was brought for the relief herein of itself and the defendant, Westworth Building and Loan Association. The latter filed its counterclaim to foreclose the \$2,500 mortgage as a prior and superior lien to plaintiff's, on the theory that its agreement of October 2, 1930, was without consideration, and that corporate power, ultra vires and invalid. The matter so when the cause was referred on both the complaint and counterclaim, found the agreement of October 2, 1930, valid and superior of plaintiff's trust deed on a parity with the association's mortgage, and recommended a decree in favor of plaintiff. The circuit court, however, sustained the exceptions of Westworth Building and Loan Association, and entered

a decree of foreclosure and sale, giving the association's \$8,000 mortgage priority over plaintiff's \$3,500 trust deed. By this appeal plaintiff seeks to reverse the decree thus entered.

Briefly set forth, the facts, which are undisputed disclose that Pearl and Steve Sabich were members of the Wentworth Building and Loan Association and were indebted to it on their \$10,000 mortgage, dated April 19, 1927. June 3, 1930, they executed and delivered to the association their new \$8,000 mortgage on the same premises at 3025 Wentworth avenue, Chicago. The new mortgage for \$8,000 was recorded June 5, 1930, but was not entered upon the books of the association until September 2, 1930, when the old \$10,000 mortgage was reduced to \$8,000 and released, leaving the new \$8,000 mortgage a first lien on the premises.

October 26, 1930, the Sabichs executed their note for \$3,500, payable to bearer, and secured the same by a junior trust deed on the same property. Early in October, 1930, Pearl and Steve Sabich appeared before the officers and directors of the association and advised them that Steve Sabich, as guardian of the estate of his nephew, Nick Curkovich, a minor, then pending in the Probate court, had encountered difficulties in his accounting of the minor's estate and desired to sell the \$3,500 note and trust deed to himself as guardian and to apply the proceeds toward settlement of his obligation to the estate in the Probate court; and he represented that unless the \$3,500 note and trust deed were placed on a par with the \$8,000 mortgage, that he would not be able to negotiate same. In accordance with this representation, the president and secretary were authorized by resolution, then and there adopted by the directors, to execute an agreement, dated October 2, 1930, which is as follows:

"Agreement.

"Whereas, Pearl Sabich and husband by their mortgage dated April 19th, 1927, and recorded on April 25th, 1927, as document 9627348 conveyed to the Wentworth Building and Loan Association the

a decree of foreclosure and sale, giving the association's \$3,000 mortgage priority over plaintiff's \$3,000 trust deed. By this appeal plaintiff seeks to reverse the decree thus entered.

Chiefly set forth the facts, which are undisputed disclosure that Pearl and Steve Labich were members of the Vancouver Building and Loan Association and were indebted to it on their \$10,000 mortgage, dated April 19, 1937. June 5, 1938, they executed and delivered to the association their new \$8,500 mortgage on the same premises at 3025 North Avenue, Chicago. The new mortgage for \$8,500 was recorded June 5, 1938, but was not entered upon the books of the association until September 2, 1938, when the old \$10,000 mortgage was reduced to \$8,500 and released, leaving the new \$8,500 mortgage a first lien on the premises.

October 26, 1938, the Labichs executed their note for \$3,500 payable to Peter, and secured the same by a joint trust deed on the same property. Early in October, 1938, Pearl and Steve Labich appeared before the officers and directors of the association and advised them that Steve Labich, as Guardian of the estate of his nephew, Nick Guskovich, a minor, then pending in the Probate Court, had encountered difficulties in his accounting of the minor's estate and desired to sell the \$3,500 note and trust deed to himself as Guardian and to apply the proceeds toward settlement of his obligation to the estate in the Probate Court; and he represented that until the \$3,500 note and trust deed were placed on a par with the \$8,500 mortgage, that he would not be able to make his object same. In accordance with this representation, the directors immediately voted and authorized by resolution, then and there adopted by the directors, to execute an agreement, dated October 2, 1938, which is as follows:

"Agreement.

"Whereas, Pearl Labich and husband by their mortgage dated April 19th, 1937, and recorded on April 23rd, 1937, as document 9827348 conveyed to the Vancouver Building and Loan Association the

certain real estate described as: Lot 20 in Block 12 in Walker's Subdivision off that part south of the north thirty acres of the east half of the south east quarter of section 28, township 39 North, Range 14, east of the third principal meridian, in Cook County, Illinois, to secure their payment of \$10,000.00, payable \$25.00 upon Tuesday of each week after date, with interest at 6% per annum, payable monthly in installments of \$50.00; and

"Whereas, the said Pearl Sabich and husband have subsequently reduced the said mortgage and have of date June 3rd, 1930, executed a new mortgage recorded on June 5th, 1930, as document No. 10675277, to the Wentworth Building and Loan Association, to secure their bond for \$8,000.00, (the said mortgage being now of the amount of \$7,500.00), and said above mentioned first mortgage having been released,

"And Whereas, it became necessary for said Pearl Sabich and husband in order to effect the reduction of the first mortgage above mentioned, to execute her certain trust deed conveying the said real estate above described, to A. Kamenjarin, as trustee, to secure their one principal promissory note for the sum of \$3,500.00 due and payable five years after date, with interest thereon at 6% per annum, and

"Whereas, the reduction of the indebtedness upon the original mortgage of date April 19th, 1927, above mentioned, by said Pearl Sabich and husband constitutes a material benefit to the Wentworth Building and Loan Association during this period of financial stringency, and

"Whereas, the value of the real estate in question is of a nature to fully secure the new existing indebtedness to the Wentworth Building and Loan Association, and also the proposed trust deed to secure the note of \$3,500.00 as above mentioned;

"Now, Therefore, Be It Resolved that if at any time during the life of the aforementioned deed of trust securing the indebtedness of \$3,500.00 aforesaid, any proceedings be instituted for foreclosure thereof that the lien of said \$3,500.00 indebtedness shall be equal to the lien of said first mortgage to the Wentworth Building and Loan Association securing said indebtedness of \$7,500.00, and shall be entitled to share equally with said first mortgage in the proceeds of any sale held under such foreclosure proceedings, and in case of any foreclosure of said first mortgage to the Wentworth Building and Loan Association, that the same equality of lien shall apply to said indebtedness of \$3,500.00 and the legal holder or holders thereof shall be equally entitled to share in the proceeds of any sale held under foreclosure proceedings of said first mortgage.

"And Be It Further Resolved, that the intent and purpose of this agreement is to secure to the legal holder or holders of said trust deed securing the \$3,500.00 indebtedness equal protection in case of foreclosure of said above described real estate, with the legal holder of the first mortgage hereinabove mentioned.

"And Be It Further Resolved that this agreement and resolution be spread upon the records of the Wentworth Building and Loan Association.

Wentworth Bld'g and Loan Ass'n

By A. Kamenjarin,
President.

G. Bjankini,
Secretary."

Wentworth Bld'g
& Loan Ass'n.

Seal

Subdivision of that part south of the north thirty acres of the certain real estate described as Lot 20 in Block 18 in "Wicks", east half of the south east quarter of section 36, township 33 North, Range 14, east of the third principal meridian, in Cook County, Illinois, to secure their payment of \$10,000.00, payable \$25.00 upon Tuesday of each week after date, with interest at 6% per annum, payable monthly in installments of \$50.00, and

the amount of \$7,500.00), and said above mentioned first mortgage having been released.

And, however, it became necessary for said party herein and husband in order to effect the restoration of the first mortgage above mentioned, to execute her certain trust and conveying the said real estate above described, to A. K. Kinsman, Jr., trustee, to secure their one principal promissory note for the sum of \$5,000.00 due and payable five years after date, with interest thereon at 6% per annum, and

Building and Loan Association during the period of financial hardship, and
Sabin and husband continue a material benefit to the mortgage of date July 15th, 1927, above mentioned, by said loan. Whereas, the reduction of the indebtedness upon the original

"Whereas, the value of the real estate in question is of a nature to fully secure the no certain indebtedness to the University Building and Loan Association, and also the proposed trust used to secure the note of \$2,500.00 as above mentioned;

Under foreclosure proceedings of said first mortgage, shall be equally entitled to share in the proceeds of any sale held in the foreclosure of said first mortgage of \$2,500.00 and the legal holder or holders thereof. Loan Association, that the same security of lien shall apply to said any foreclosure of a first mortgage in the event of default in any sale held and a such foreclosure proceedings, and in case of entitled to share equally with said first mortgage in the proceeds Association account and indebtedness of \$7,500.00, and shall be to the lien of said first mortgage to the extent of said first mortgage of \$2,500.00. Indebtedness shall be equal of \$2,500.00 fore and, any proceeds be limited for foreclosure the life of the aforementioned of trust account, the indebtedness "Now, Therefore, Be It Resolved that if at any time during

case of foreclosure of said above described real estate, with the least holder of the first mortgage hereinabove mentioned, this deed securing the \$3,500.00 Indebtedness shall protect in this agreement is to secure to the legal holder or holders of said "and be it further resolved, that the intent and purpose of

"And Be It Further Resolved, That this agreement and resolution be spread upon the records of the Town of Springfield and Town of Northampton."

Wentworth Rd
A. J. J. J. J.

George W. Bush
Vice President
President
By A. Hamon, Jr.
Secretary of the Board

October 7, 1930, the trust deed securing the \$3,500 note, which together with the agreement of October 2, was attached to the trust deed, was duly recorded, and the following day the Probate court entered an order in the estate of Nick Curkovich, a minor, authorizing Sabich, as guardian, to purchase the \$3,500 note and trust deed; and the court specifically found that the association had executed and delivered the agreement (and resolution) dated October 2, 1930, which provided that in the event of the foreclosure of either the \$3,500 note and trust deed or the \$8,000 mortgage, each should be entitled to share equally in the proceeds of sale. Thereafter, November 20, 1930, the \$3,500 note and trust deed were purchased by the United States Casualty Company, plaintiff, from the guardian of the minor's estate, before maturity, and without notice of any infirmity. In October, 1935, plaintiff filed its suit to foreclose the note and trust deed in accordance with the terms of the agreement of October 2, 1930, for the equal use and benefit of plaintiff and defendant, Wentworth Building and Loan Association, and then for the first time the association filed its counterclaim alleging that the agreement was without consideration, ultra vires and therefore invalid.

It is urged as ground for reversal that the agreement is supported by a valuable consideration; that it was within the scope of defendant's corporate powers, and not ultra vires; and that defendant is estopped to assert the defense of ultra vires under the circumstances presented by the record.

Since the charter granted to the Wentworth Building and Loan Association by the State of Illinois, June 11, 1917, does not specifically define or limit its corporate powers, an examination of the Building and Loan Association Act (chap. 32, Ill. Rev. Stats., 1937) under which defendant was organized, becomes necessary to determine

October 7, 1930, the trust was assigned the \$3,500 note, together with the agreement of October 2, 1930, which was duly recorded, and the following day the trustee entered an order in the estate of John J. Davis, executor, ordering the \$3,500 note and trust deed; King B. Davis, as executor, to purchase the \$3,500 note and trust deed; and the court specifically found that the association had executed and delivered the agreement (and resolution) dated October 2, 1930, which provided that in the event of the foreclosure of either the \$3,500 note and trust deed or the \$5,000 mortgage, each should be entitled to share equally in the proceeds of sale. Thereafter, November 30, 1930, the \$3,500 note and trust deed were purchased by the United States Casualty Company, plaintiff, from the executor of the minor's estate, before maturity, and without notice of any infirmity. In October, 1930, plaintiff filed its suit to foreclose the note and trust deed in accordance with the terms of the agreement of October 2, 1930, for the equal use and benefit of plaintiff and defendant, plaintiff building and loan association, and then for the first time the association filed its counterclaim alleging that the agreement was without consideration, ultra vires and therefore invalid.

It is urged as ground for reversal that the agreement is supported by a valuable consideration, that it was within the scope of defendant's corporate powers, and not ultra vires, and that defendant is estopped to assert the defense of ultra vires under the circumstances presented by the record.

Since the charter granted to the plaintiff building and loan association by the State of Illinois, June 11, 1919, does not specifically define or limit its corporate powers, an examination of the Building and Loan Association Act (chap. 32, Ill. Rev. Stat., 1927) under which defendant was organized, becomes necessary to determine

whether the agreement of October 2, 1930, was within the scope of its powers. Sections 1,2-6,7, pars. 213,214-218 and 219, provide for the formation of associations such as plaintiff, for the purpose of accumulating funds to be lent to its members. Under these sections the associations are given the power to sue and be sued, and it is provided that "the directors shall have all such powers not enumerated herein as are necessary and proper to enable such association to carry out the purposes of its organization." The only limitation upon the association's power to make loans is contained in section 19, par. 231, of the act, as follows: "*** no loan shall be made by said association except to its own members, nor in any sum in excess of the amount of shares held by such members borrowing, but such shareholders may borrow such fractional part of One Hundred Dollars. Good and ample real estate security, unencumbered, except by prior loans of such association, shall be given by the borrower to secure the payment of the loan; ***." It appears from these sections of the statute that the only restrictions upon the association's power to make loans are two-fold: ⁽¹⁾ loans to persons who are not members of the association, and (2) loans in an amount exceeding the amount of the shares of the association held by the borrower. The statute places no limitation upon the association as to the security it may accept or retain for the loan; it is incumbent upon the borrower to secure the loan by ample real estate security, free of all except prior loans of the association.

The undisputed evidence of record discloses that prior to October 2, 1930, Sabich and the association fully complied with the requirements of the statute with reference to the \$8,000 mortgage. Pearl and Steve Sabich were members of the association, and the loan was not in excess of the amount of the association's shares held by them. The statutory requirement that good and ample security be given by the borrower was apparently fulfilled, for the agreement of

whether the same was made of October 2, 1930, and within the scope of its powers. Section 1, 2-3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

October 2 recites that the "value of the real estate in question is of a nature to fully secure the now existing indebtedness to the Wentworth Building and Loan Association, and also the proposed trust deed to secure the note of \$3,500 ***." At the time this second mortgage was given the real estate security was unincumbered except for the prior \$8,000 mortgage. By the agreement of October 2 the real estate afforded equal security to both incumbrances in the event of foreclosure of either loan.

So far as the borrower is directed to give the association unincumbered real estate security, par. 231 of the Building and Loan Association act does not operate as a limitation of the association's corporate power to either accept or retain, as security for its loan, real estate having equal or prior incumbrances or liens thereon.

(Juergens v. Cobe, 99 Ill. App. 156, and cases cited therein.)

Plaintiff takes the position that the association, having determined by reason of the reduction of the \$8,000 mortgage to \$7,500, that the security it held was sufficient to adequately protect the \$3,500 note, in effect released a part of such security in favor of the holder of the \$3,500 note and trust deed, and that neither its charter nor the statute under which the association was incorporated prohibited it from releasing its security, partially or in toto. In the Juergens case the court called attention to the contention of appellant that it was beyond the power of the "Union" to make loans subject to the prior Plumer incumbrance, and concluded that it did not regard these loans as beyond the association's power, because "if the statute be read strictly it is not a positive prohibition to the association, but is mandatory upon the borrowing member requiring him to give such unincumbered security," and under the authority of that case it is immaterial that the association in the case at bar may have improperly given up or released a portion of its security, since it had the power so to do.

The law is well settled that the burden of proving the

October 2 recited that the "value of the real estate in question is of a nature to fully secure the now existing indebtedness to the Wentworth Building and Loan Association, and also the proposed trust deed to secure the note of \$5,000 * * *". At the time this second mortgage was given the real estate security was unincumbered except for the prior \$8,400 mortgage. By the agreement of October 2 the real estate afforded equal security to both incumbrances in the event of foreclosure of either loan.

So far as the borrower is directed to give the Association unincumbered real estate security, par. 201 of the Building and Loan Association act does not operate as a limitation of the association's corporate power to either accept or retain, as security for its loan, real estate having equal or prior incumbrances on same thereon.

(Tharaga v. Gobe, 27 Ill. App. 186, and cases cited therein.)

Plaintiff takes the position that the Association, having retained by reason of the redemption of the \$8,000 mortgage to \$7,500, that the security it held was sufficient to adequately protect the \$5,500 note, in effect released a part of such security in favor of the holder of the \$5,500 note and trust deed, and that neither its charter nor the statute under which the Association was incorporated prohibited it from releasing its security, partially or in toto. In the Tharaga case the court called attention to the contention of appellant that it was beyond the power of the "Union" to make loans subject to the prior

Flower incumbrance, and concluded that it did not require these loans as beyond the association's power, because "all the statute he exacted strictly it is not a positive prohibition to the association, but is mandatory upon the borrower, requiring him to give such unincumbered security," and under the authority of that case it is immaterial that the Association in the case at bar may have improperly given up or released a portion of its security, since it had the power so to do. The law is well settled that the burden of proving the

defense of ultra vires, being an affirmative defense, rests upon the party who interposes it (Royal Drug Co., Inc. v. Levin, 273 Ill. App. 231) and in order to maintain this position defendant would have to show that it was beyond its powers to agree that the real estate should equally secure both loans in the event of foreclosure. The Juergens case holds that the making of second mortgages is not beyond the charter powers of a building and loan association, and it clearly appears that under the agreement of October 2, 1930, defendant did not entirely subordinate the lien of the \$8,000 mortgage to the \$3,500 trust deed, but it only agreed that the real estate should equally secure both loans in the event of foreclosure.

The agreement in question was entered into in good faith and under the modern trend of authorities contracts so made, when completely or partially executed, are not subject to the defense of ultra vires, unless they are malum prohibitum or malum in se. In Royal Drug Co., Inc. v. Levin, supra, it was said that the defense of ultra vires is looked upon by many courts with disfavor, and that in recent cases the rule had been frequently announced that such pleading should not be allowed to prevail, whether interposed for or against a corporation, when it will not advance justice, but on the contrary will accomplish a legal wrong, and numerous cases were cited in support of this conclusion. The court quoted at length from Benson Lumber Co. v. Thornton, 185 Minn. 230, wherein it was said that "contracts should not be held ultra vires unless clearly shown so to be.

"The present tendency is to restrict the defense of ultra vires in actions between private parties as far as possible, if not to deny it altogether, except in the case of contracts wholly executory. The general rule is that such contracts are unenforceable when wholly executory, but when executed on one side they are enforceable because the public policy of justice over-balances the public policy of keeping

defense of ultra vires, being an affirmative defense, rests upon the party who interposes it (Novel Drug Co., Inc. v. Leavin, supra, 111. App. 231) and in order to sustain this position defendant would have to show that it was beyond its powers to agree that the real estate should equally secure both loans in the event of foreclosure. The Leavin case holds that the making of second mortgages is not beyond the charter powers of a building and loan association, and it clearly appears that under the agreement of October 2, 1930, defendant did not actually subordinate the lien of the \$8,000 mortgage to the \$5,500 first loan, but it only agreed that the real estate should equally secure both loans in the event of foreclosure.

The agreement in question was entered into in good faith and under the modern trend of authoritative contracts so made, when completely or partially executed, are not subject to the defense of ultra vires, unless they are ultra vires in the sense of Novel Drug Co., Inc. v. Leavin, supra, it was said that the defense of ultra vires is looked upon by many courts with disfavor, and that in recent cases the rule had been frequently announced that such pleading should not be allowed to prevail, whether interposed for or against a corporation, when it will not advance justice, but on the contrary will accomplish a legal wrong, and numerous cases were cited in support of this conclusion. The court quoted at length from Hanson Lumber Co. v. Thornton, 185 Minn. 230, wherein it was said that "contracts should not be held ultra vires unless clearly shown to be."

"The present tendency is to restrict the defense of ultra vires in actions between private parties as far as possible, if not to deny it altogether, except in the case of contracts wholly executory. The general rule is that such contracts are unenforceable when wholly executory, but when executed on one side they are enforceable because the public policy of justice over-balances the public policy of keeping

the corporation within the limits of its charter." A like conclusion was reached in Kadish et al. v. Garden City Equitable Loan and Building Ass'n et al., 151 Ill. 531. The undisputed evidence in this case discloses that the agreement of October 2, 1930, was made after full consideration by the officers and Board of directors, and that the minor's estate was induced to invest \$3,500 of the minor's funds in the trust deed on the basis of the agreement. It was only because of the undertaking contained in the agreement that plaintiff purchased the note, and defendant did nothing for more than five years to challenge the agreement or deny its validity. Only when the complaint to foreclose the \$3,500 note was filed did defendant assert the counterclaim and defense of ultra vires. Under the circumstances it would work an injustice on plaintiff to deprive it of the equal security to which its note and trust deed are entitled under the agreement of October 2, 1930. Since the agreement in question was neither malum prohibitum nor malum in se, and was partly executed, the doctrine of estoppel is clearly applicable.

The remaining question to be determined is whether the agreement of October 2, 1930, was supported by a good consideration. In sustaining defendant's fourth exception to the master's report, the court found that the agreement was not supported by any valid consideration. We think the court erred in so finding. The contract was not only under seal, but was amply supported by an actual consideration, in that it was made for the benefit of Sabich, who was induced to invest his funds in the \$3,500 note upon the representation of defendant that they would release a portion of the security for the \$8,000 mortgage and thereby make the \$3,500 trust deed an equal lien with the larger incumbrance in case of foreclosure. Upon this representation Sabich invested his funds as guardian, and when he did so the transaction was completed and constituted a consideration for

the agreement entered into by defendant. In this transaction it was not necessary that the defendant receive a benefit in exchange for its promise; it is sufficient that Sabich, the purchaser of the note, acted to his own detriment. (Williston on Contracts, Revised Ed. (1936), vol. 1, sec. 113, p. 384; Green v. The Ashland Sixty-Third State Bank, 346 Ill. 174.) Moreover, plaintiff's counsel call attention to the fact that the agreement specifically recites that an actual benefit had been received by the association. The evidence discloses that the directors knew that Sabich had difficulty in his accounts and needed the proceeds of the \$3,500 note to clear his obligations to the estate. With this knowledge the directors undertook to assist the Sabichs, and in so doing misrepresented in their agreement that the \$8,000 mortgage had been reduced to \$7,500. It also falsely stated that the proceeds of the \$3,500 note had been used in reducing the Sabich original \$10,000 loan to \$8,000 in amount. The fact of the matter was that the proceeds of the \$3,500 note were used by Sabich to cover a shortage in his accounts, and the directors were fully aware of these facts. Under the circumstances the association should not be permitted to rely upon these misrepresentations as a denial of the existence of any consideration for the agreement.

We are of the opinion that the agreement of October 2 was valid, and since it was partly executed the defense of ultra vires should not be entertained to defeat plaintiff's right. Plaintiff's note and trust deed for \$3,500 are entitled to share on a parity in the proceeds of the sale of the premises, and the court was in error in holding otherwise. Therefore, the decree of the Superior court is reversed with directions to enter a decree in favor of plaintiff, as recommended by the master.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Burke, P. J., and Sullivan, J., concur.

the agreement entered into by defendant. In this transaction it was not necessary that the defendant receive a benefit in exchange for its promise; it is sufficient that which, the purchase of the note, acted to his own detriment. (Hillman on Contracts, Revised Ed. (1936), vol. 1, sec. 113, p. 384; Green v. The Washington Sixty-Third State Bank, 308 Ill. 174.) Moreover, plaintiff's counsel call attention to the fact that the agreement specifically recites that an actual benefit had been received by the defendant. The evidence discloses that the directors knew the bank had difficulty in his accounts and noted the proceeds of the \$5,000 note to clear his obligations to the bank. With this knowledge the directors undertook to assist the bank, and in so doing misrepresented in their agreement that the \$5,000 note had been returned to \$7,500. It also falsely stated that the proceeds of the \$5,000 note had been used in redeeming the bank's original \$10,000 loan to \$8,000 in amount. The fact of the latter and that the proceeds of the \$5,000 note were used by bank to cover a deficit in its accounts, and the directors were fully aware of these facts. Under the circumstances the association should not be permitted to rely upon these misrepresentations as a denial of the existence of any consideration for the agreement.

We are of the opinion that the agreement of defendant is valid, and since it was partly executed the defense of ultra vires should not be entertained to defeat plaintiff's rights. Plaintiff's note and trust deed for \$5,500 are entitled to share on a parity in the proceeds of the sale of the premises, and the court was in error in holding otherwise. Therefore, the decree of the Superior Court is reversed with directions to enter a decree in favor of plaintiff, as recommended by the master.

FOR PLAINTIFF AND MASTER,
 JAMES J. L. LUTHER, Attorney at Law,
 Burke, P. J., and Sullivan, J., concur.

40274

ISIDORE HACKMAN, also known as
IRVING L. HACKMAN,
Appellee,

v.

JACOB PLATT,
(defendant).

THE LIVE STOCK NATIONAL BANK
OF CHICAGO, a corporation,
(garnishee),
Appellant.

EVA STONE,
Intervener and Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

298 I.A. 626⁴

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Isidore Hackman, also known as Irving L. Hackman, plaintiff, had judgment against Jacob Platt for \$1,976.10, and brought garnishment proceedings against the Live Stock National Bank of Chicago and others. All the garnishees were dismissed before trial except the Live Stock National Bank, which filed answer setting forth that at the time of the service of the garnishment writ it had in its possession \$537.62 in a joint account under the names of Jacob Platt and Eva Stone, and that it did not have in its possession, custody or control, any moneys, chattels or property belonging to the defendant, Jacob Platt.

Eva Stone intervened and claimed the entire fund as her own. The cause was heard by the court without a jury, resulting in a finding and judgment in favor of plaintiff and against the garnishee and intervener, from which Eva Stone, in her own behalf and in the name of the garnishee, prosecutes this appeal.

The evidence discloses that July 31, 1935, Jacob Platt had

ISIDORE HACHMAN, also known as
IRVING L. HACHMAN,
Appellee,

v.

JACOB PLATT,
(defendant).

THE LIVE STOCK NATIONAL BANK
OF CHICGO, a corporation,
(appellee),

Appellant.

EVA STONE,
Intervener and Appellant.

U. S. DISTRICT COURT SOUTHERD DISTRICT OF NEW YORK.

Isidore Hachman, also known as Irving L. Hachman, Plaintiff, had judgment against Jacob Platt for \$1,000.00, and brought garnishment proceedings against the Live Stock National Bank of Chicago and others. All the garnishees were dismissed before trial except the Live Stock National Bank, which filed a cross motion for judgment at the time of the service of the garnishment writ it had in its possession \$57.62 in a joint account under the names of Jacob Platt and Eva Stone, and that it did not have in its possession custody or control, any moneys, chattels or property belonging to the defendant, Jacob Platt.

Eva Stone intervened and claimed the entire fund as her own. The cause was heard by the court without a jury, resulting in a finding and judgment in favor of Plaintiff and against the garnishees and intervenor, from which Eva Stone, in her own behalf and in the name of the garnishees, prosecuted this appeal.

The evidence disclosed that July 31, 1926, Jacob Platt had

an account with the Live Stock National Bank of Chicago, containing \$500. On that day he closed out the account and had the entire \$500 transferred to a new joint account with Eva Stone, his married daughter. The agreement between the bank and the depositors, as evidenced by the signature card, contains the following provision: "It is hereby agreed that the joint account of the undersigned in the Live Stock National Bank of Chicago shall be payable to or upon the order of either, or in case of the death of one, then to or upon the order of the survivor."

Eva Stone, the intervener, who claims ownership of the entire funds in the joint account, urges two principal reasons for reversal: (1) that it was error to allow plaintiff to avail himself of the process of garnishment, because a joint account is not garnishable at the instance of a judgment creditor of one of the joint owners, and that where the garnishee's answer discloses that the account is held in joint tenancy, in the absence of fraud, the suit must fail; and (2) that plaintiff did not prove his cause by showing that the judgment debtor was the owner of the funds on deposit in the joint account. The second question is one of fact, upon which there was considerable conflict in the evidence. Plaintiff contended on trial that the joint account of Jacob Platt and Eva Stone was a fraud and a sham, its purpose being to afford Platt, the sole owner of the funds in the account, the convenience of a checking account and at the same time protection from creditors who might proceed against the account, by having his daughter claim the money as her own. The record discloses that the indebtedness upon which the judgment and garnishment is predicated was due and outstanding when the joint account was formed. July 31, 1935, Platt had exactly \$500 in a personal account with the garnishee. On that day he closed out this account and caused the bank to transfer the entire sum to a new account, bearing the names of "Jacob Platt and Eva Stone." This new account was a checking account against which Platt had the right

an account with the live stock national bank of Chicago, containing \$500. On that day he closed out the account and had the entire \$500

transferred to a new joint account with Mrs. Stone, his married

daughter. The agreement between the bank and the depositors, as evidenced by the signature card, contains the following provision:

"It is hereby agreed that the joint account of the undersigned in the live stock national bank of Chicago shall be payable to or upon the order of either, or in case of the death of one, then to or upon the order of the survivor."

Now Stone, the father, who claims ownership of the

entire funds in the joint account, after the withdrawal from the reversal: (1) that it was never to allow liability to attach

self of the process of garnishment, because a joint account is not

garnishable at the instance of a judgment creditor of one of the

joint owners, and that where the garnishee's answer discloses that

the account is held in joint tenancy, in the absence of fraud, the

suit must fail; and (2) that plaintiff did not prove his claim by

showing that the judgment debtor was the owner of the funds on

deposit in the joint account. The second question is one of fact,

upon which there was considerable conflict in the evidence. Plaintiff

contended on trial that the joint account of Jacob Platt and Mrs.

Stone was a fraud and a sham, its purpose being to effect Platt's

sole owner of the funds in the account, the conversion of a checking

account and at the same time protection from creditors who might pro-

ceed against the account, by having his daughter claim the money as

her own. The record discloses that the indebtedness upon which

the judgment and garnishment is predicated was due and outstanding

when the joint account was formed. July 31, 1935, Platt had exactly

\$500 in a personal account with the garnishee. On that day he closed

out this account and caused the bank to transfer the entire sum to

a new account, bearing the names of "Jacob Platt and Mrs. Stone." This

new account was a checking account against which Platt had the right

to draw checks. Eva Stone, the intervener, proceeded upon the theory that the \$500 in the joint account belonged to her, and that she had obtained this sum from her husband, and that no part of it belonged to Platt. She claimed that the \$500 was originally deposited for the convenience of her husband, who worked for his brother in the operation of a handbook and whose business required a banking connection enabling him to cash checks of various denominations from time to time, and that by virtue of this account her husband was permitted by the bank to cash such checks as his business required. The account was also used, according to intervener's contention, for the convenience of other members of defendant's family, and was maintained at the sum of \$500 in order to eliminate the customary bank charges which would generally be made if the account ran below a certain minimum sum. Plaintiff's counsel analyze in detail the rather voluminous testimony adduced by the respective parties, and show without question that the testimony of both Platt, his daughter and other witnesses as to the ownership of the fund was so conflicting as to cast grave doubt upon the contentions made by Mrs. Stone. Her counsel concede that there is a conflict in the evidence, but they say that it was incumbent upon plaintiff to prove that the funds belonged to Platt and not to Eva Stone, and that notwithstanding the conflicting evidence, plaintiff failed in this behalf. Without going into an extended discussion of the evidence, we are satisfied, after a careful review of the record, that the court was fully justified in resolving the issues in plaintiff's favor. At the conclusion of all the evidence, the court made the following comments in support of his conclusions: "As far as I am concerned, from the testimony I heard, and I can only be guided by that, I honestly believe it is the father's money. *** You have a situation here, too, where your witnesses absolutely disprove the fact that it is a joint account. I cannot see it any other way. I want to look at it the same as the jury would." Mr. Schwartz (counsel

to draw checks. The intervenor, the intervenor, proceeded upon the theory that the \$500 in the joint account belonged to her, and that she had obtained this sum from her husband, and that no part of it belonged to him. She claimed that the \$500 was originally deposited for the convenience of her husband, who worked for his brother in the operation of a hardware and whose business required a banking connection enabling him to cash checks of various denominations from time to time, and that by virtue of this account her husband was permitted by the bank to cash such checks as his business required. The account was also used, according to intervenor's contention, for the convenience of other members of defendant's family, and was maintained at the sum of \$500 in order to eliminate the customary bank charges which would generally be made if the account ran below a certain minimum sum. Plaintiff's counsel analyzes in detail the rather voluminous testimony adduced by the respective parties, and shows without question that the testimony of both parties, his daughter and other witnesses as to the ownership of the fund was so conflicting as to cast grave doubt upon the conclusions made by Mrs. Stone. Her counsel concede that there is a conflict in the evidence, but they say that it is in her favor upon plaintiff to prove that the funds belonged to him and not to Mrs. Stone, and that notwithstanding the conflicting evidence, plaintiff failed in this behalf. Without going into an extended discussion of the evidence, we are satisfied, after a careful review of the record that the court was fully justified in resolving the issue in plaintiff's favor. At the conclusion of all the evidence, the court made the following comments in support of his conclusions: "As far as I am concerned, from the testimony I heard, and I can only be guided by that, I honestly believe it is the father's money. Now you have a situation here, too, where your witness absolutely disproves the fact that it is a joint account. I cannot see it any other way. I want to look at it the same as the jury would." Mr. Schwartz (counsel

for plaintiff): "Shall I point out some of the conflicting testimony?" The Court: "Any man in the courtroom could tell it was conflicting. I was fully convinced that the money was Mr. Platt's to start out with. You take all of these checks and all the deposits made in the name of Jacob Platt, it looks like it is Jacob Platt's account."

Certain salient facts are undisputed. In response to a subpoena duces tecum, the garnishee produced documents showing the transfer of \$500 by Jacob Platt from his person^{al} account to the joint account July 1, 1935. The ledger sheets of the bank, and deposit slips produced, all show the deposits as being made into the account of Jacob Platt. In response to subpoena duces tecum, the latter produced six checks as being the only ones that he could find out of a great number drawn against the account, substantially all drawn by him. It further appears that Jacob and Gustav Platt were the only ones to make deposits in the joint account, although intervenor claims that both received the money from her when they made deposits, and that she got it from her husband. The twelve deposit slips, extending from September 17, 1935, to January 11, 1938, all show that the money was deposited to the account of Jacob Platt, and not to that of "Jacob Platt and Eva Stone." Seven of these deposits were actually made by the debtor, and five by his brother, Gustav Platt. Although the ledger sheets show that 89 checks were drawn on the account, only six of them were produced in court and introduced in evidence. The other 83 checks are unaccounted for, and plaintiff argues that they were not produced because they would have been damaging to intervenor's claim to ownership of the funds. Mrs. Stone, although claiming that the \$500 in the account was her own, could not satisfactorily explain just how it got into Platt's personal account.

Although the findings of the court are not conclusive, it

for plaintiff): "I shall point out some of the conflicting testimony." The Court: "Any man in the courtroom could tell it is conflicting. I was truly convinced that the money was Mr. Platt's to start out with. You took all of these checks and all the deposits made in the name of Jacob Platt, it looks like it is Jacob Platt's account."

Certain relevant facts are undisputed. In response to a subpoena duces tecum, the defendant produced documents showing the transfer of \$500 by Jacob Platt from his personal account to the joint account July 1, 1935. The ledger sheets of the bank, and deposit slips produced, all show the deposits as being made into the account of Jacob Platt. In response to subpoena duces tecum, the latter produced six checks as being the only ones that he could find out of a great number drawn against the account, substantially all drawn by him. It further appears that Jacob and Gustav Platt were the only ones to make deposits in the joint account. I thought interesting claims that both received the money from her when they made deposits, and that she got it from her husband. The twelve deposit slips, extending from September 14, 1935, to January 11, 1936, all show that the money was deposited to the account of Jacob Platt, and not to that of "Jacob Platt and Mrs. Jones." None of these deposits were actually made by the debtor, and five by his brother, Gustav Platt. Although the ledger sheets show that 32 checks were drawn on the account, only six of them were produced in court and introduced in evidence. The other 26 checks are unaccounted for, and plaintiff argues that they were not produced because they would have been damaging to intervenor's claim to ownership of the funds. Mrs. Jones, although claiming that the \$500 in the account was her own, could not satisfactorily explain just how it got into Platt's personal account. Although the findings of the court are not conclusive, it

has been generally held that they will not be disturbed by a reviewing court unless clearly against the weight of the evidence. (Iedbetter v. Evans, 290 Ill. App. 533; Hadley v. White, 367 Ill. 406, 409.) The court indicated its findings and the reasons therefor, and we think that these findings are abundantly justified by the evidence adduced upon the hearing.

The legal proposition contended for by the intervener, under her first point, is supported by cases decided prior to the amendment of section 1 of the Garnishment Act (Illinois Rev. Stats. 1937, chapter 62) in 1923. Since the amendment the courts have held that the amendment allows the judgment creditor to avail himself of the process of garnishment in proceedings against the interest of his judgment debtor where a debt is due such debtor and another. In Alexander v. Live Stock National Bank, 282 Ill. App. 315, a stock certificate was held by the bank under an escrow agreement for the benefit of the judgment debtor, Alexander and another, upon payment of certain obligations. The judgment creditor sought by garnishment to reach Alexander's interest in the stock certificate. In affirming the judgment in favor of plaintiff, the court held that garnishment was proper to reach the interest of the judgment debtor, notwithstanding another person's interest in that same certificate. In Boksa v. Buchanan, 245 Ill. App. 602, the garnishee contended that a judgment creditor of two or more judgment debtors could not maintain garnishment to reach a debt owing to one of the joint debtors, but the court held that sec. 1 of the Garnishment Act, as amended in 1923, changed the law and nullified the rule enunciated in the earlier case of Siegel Cooper & Co. v. Schueck, 167 Ill. 522.

In Brown v. First National Bank, 271 Ill. App. 424, the judgment debtor, Brown, and his wife had a joint bank account with the garnishee, and plaintiff sought to reach by process of garnishment, Brown's interest in the joint account. Plaintiff failed to recover

has been generally held that they will not be disturbed by a reviewing court unless clearly against the weight of the evidence. (Lester v. Yarns, 230 Ill. App. 503; Taylor v. Miller, 257 Ill. App. 402.) The court indicated its findings and the reasons therefor, and we think that these findings are abundantly justified by the evidence adduced upon the hearing.

The legal proposition contained for by the intervenor, under her first point, is supported by cases decided prior to the amendment of section 1 of the Garnishment Act (Illinois Rev. Stat. 1937, chapter 62) in 1933. Since the amendment the courts have held that the amendment allows the judgment creditor to avail himself of the process of garnishment in proceedings against the interest of his judgment debtor where a debt is due from such debtor and another. In Alexander v. Live Stock National Bank, 237 Ill. App. 715, a stock certificate was held by the bank under an account belonging to the benefit of the judgment debtor, Alexander and another, upon payment of certain obligations. The judgment creditor sought by garnishment to reach Alexander's interest in the stock certificate. In affirming the judgment in favor of plaintiff, the court held that garnishment was proper to reach the interest of the judgment debtor, notwithstanding another person's interest in that same certificate. In Alexander v. Buchanan, 245 Ill. App. 602, the garnishee contained the judgment creditor of two or more judgment debtors could not maintain garnishment to reach a debt owing to one of the joint debtors, but the court held that sec. 1 of the Garnishment Act, as amended in 1933, changed the law and nullified the rule enunciated in the earlier case of Daniel Cooper & Co. v. Buchanan, 127 Ill. 522.

In Brown v. First National Bank, 271 Ill. App. 434, the judgment debtor, Brown, and his wife had a joint bank account with the garnishee, and plaintiff sought to reach by process of garnishment Brown's interest in the joint account. Plaintiff failed to recover

because he did not show that Brown actually had any money in the account, but in discussing the facts the court intimated that plaintiff could have recovered, had he shown the judgment debtor's beneficial interest, saying (p. 426):

"But this fact [that either could withdraw funds] would not warrant the conclusion that the plaintiff was entitled to a judgment against the garnishee if part of the money on deposit belonged to R.H.Brown, as receiver in the five cases mentioned, and part to Rose Brown, his wife. The only money that could be subject to the payment of the judgment against Brown would be his own money."

In referring to Brown v. First National Bank, the author, in an article in the Illinois Law Review, vol. 32, p. 59, made the following comments:

"Actual beneficial ownership governs when a creditor of one party seeks to garnish the joint account. This issue recently arose in Illinois in Brown v. First National Bank. There, a creditor of the husband was seeking to garnish a bank deposit payable to 'R. H. or Rose Brown' (husband or wife), with an accompanying agreement that either might withdraw all of the deposit. The husband's defense was that in fact none of the money was his. The action was dismissed, the court holding that the garnisher was limited to the husband's own interest in the account, and that the garnisher did not make out a prima facie case that the money belonged to the husband simply by showing the joint form of the account. There are few other decisions on this question, but all seem agreed that the depositors may show the actual ownership of the funds."

After a careful review of the evidence we have reached the conclusion that plaintiff sufficiently established his claim that the funds in the joint account belonged to Platt. The court so found and the evidence supports his conclusions. Therefore, the judgment of the Municipal court is affirmed.

AFFIRMED.

Burke, P. J., and Sullivan, J., concur.

because he did not show that Brown actually had any money in the account, but in discussing the facts the court indicated that plainiff could have recovered, had he shown the defendant's efforts to conceal his interest, saying (p. 422):

"But this fact [that either could witness under oath] would warrant the commission that the division was entitled to a judgment against the guarantee if part of the money on deposit belonged to R.H. Brown, as receiver in the five times mentioned, and part to Rose Brown, his wife. The only money it could be subject to the payment of the judgment against would be his net property."

In referring to Brown v. Board of Education, the court in its opinion in the Little Rock Nine Case, stated:

"The Court has consistently held that the Fourteenth Amendment does not require the States to abolish segregation in public schools."

"Actual beneficial ownership vests in the depositor, and the depositor alone is entitled to the principal and interest. This is so in every case in Illinois in Brown v. First National Bank, there, a depositor of money in a bank, who was entitled to the principal and interest, and the bank was not entitled to the principal and interest. The agreement that either party might withdraw all of the deposit, the husband's defense was that in fact none of the money was his. The action was dismissed, the court saying that the withdrawal was limited to the husband's own interest in the account, and that the grantor did not make out a prima facie case that the money belonged to the husband simply by showing the joint form of the account. There are few other decisions on this point, but all seem to agree that the depositor may show the actual ownership of the fund."

After a careful review of the evidence we have reviewed the
conclusion that Plaintiff sufficiently established his claim that the
funds in the joint account belonged to Plaintiff. The court found
and the evidence supports his conclusion. Therefore, the judgment
of the principal court is affirmed.

Burke, E. J., and Oliver, J. L., 1969.

40440

OLGA YELMLAND, ARNEI LOWE,
G. W. HENRIKSEN, CHRIST LILLEDAL
and LUCILLE RHODES,

Appellees,

v.

SCHILLER KAISER,

Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

298 I.A. 627¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On December 25, 1935, a Ford V-8 passenger automobile, driven by Simon Kjelsaas, and having as passengers, Olga Yelmland, Arnei Lowe, G. W. Henriksen, Christ Lilledal, and Lucille Rhodes, collided with a Ford truck driven by Schiller Kaiser, in which his wife, Louise, was a passenger, on Irving Park boulevard near its intersection with Sayre avenue. The five passengers in Kjelsaas's car brought suit in the Superior court (appealed as General No. 40440) to recover for personal injuries arising out of this accident. Kaiser and his wife brought another action against Kjelsaas in the same court (appealed as General No. 40441). Both actions were consolidated and tried together. Lucille Rhodes, one of the original plaintiffs in 40440, was dismissed before trial on plaintiff's motion. In cause No. 40440 the jury returned verdicts in favor of Olga Yelmland for \$800; in favor of Arnei Lowe for \$75; in favor of G. W. Henriksen for \$250; and for Christ Lilledal in the sum of \$75. In case No. 40441 a verdict of not guilty was returned as to the claims of Schiller Kaiser and his wife. Judgments were entered on the verdicts of the jury, and two separate appeals were prosecuted to this court, where an order of consolidation was entered during the pendency of these appeals.

OLGA YEIMLAND, ARTHUR LOWE,
G. W. HENRIKSEN, CHRIST LILLIEDAL
and INSULIE RHODES,

Appellants,

v.

BECHTOLD KAISER,

Appellant.

APPEALS FROM SUPERIOR

COURT, COOK COUNTY.

393 I.A. 627

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

On December 22, 1932, a Ford V-8 passenger automobile, driven by Simon Kjelsaas, and having as passengers, Olga Yeimland, Arthur Lowe, G. W. Henriksen, Christ Lilledal, and Insulie Rhodes, collided with a Ford truck driven by Bechtold Kaiser, in which his wife, Louisa, was a passenger, on Irving Park boulevard near its intersection with Maple avenue. The five passengers in Kjelsaas's car brought suit in the superior court (appealed as General No. 40440) to recover for personal injuries arising out of this accident. Kaiser and his wife brought another action against Kjelsaas in the same court (appealed as General No. 40441). Both actions were consolidated and tried together. Insulie Rhodes, one of the original plaintiffs in 40440, was dismissed before trial on plaintiff's motion. In case No. 40440 the jury returned verdicts in favor of Olga Yeimland for \$800; in favor of Arthur Lowe for \$75; in favor of G. W. Henriksen for \$250; and for Christ Lilledal in the sum of \$75. In case No. 40441 a verdict of not guilty was returned as to the claims of Bechtold Kaiser and his wife. Judgments were entered on the verdicts of the jury, and two separate appeals were prosecuted to this court, where an order of consolidation was entered during the pendency of these appeals.

In order to avoid confusion of the numerous parties involved, the plaintiffs in cause No. 40440 will be referred to as appellees, and Kaiser and his wife as appellants.

The sole ground urged for reversal of these two causes is that the verdicts were against the manifest weight of the evidence. The accident occurred at about 5:45 on the afternoon of the day in question. Kjelsaas was driving the Ford V-8 passenger automobile in an easterly direction on Irving Park boulevard, and had as passengers in his car the appellees herein. At 4:30 p.m. they had left Barrington, Illinois, where they had attended a Christmas party that started December 24th. Substantially all the witnesses agreed that a heavy snow storm had been raging for some two or three hours prior to the accident. Appellees were driving in the south, or eastbound lane of Irving Park boulevard. Kaiser and his wife were proceeding in the north or westbound lane of Irving Park boulevard, in a Ford truck with an enclosed cab. Kaiser testified that he saw two cars approaching him from the west, and that when he was some 200 feet from the car farthest west it pulled out from behind the car which preceded it and came toward him in a diagonal direction and completely across Irving Park boulevard to the north or outer lane in which he was driving, and that the right hand side of both cars collided; that after the impact appellees' car was completely off Irving Park boulevard and up against a fence several feet north of the highway, facing in a westerly direction.

Martin M. Anderson and his wife, Corrine, of Elgin, Illinois, were the occupants of the eastbound car which immediately preceded appellees. Mr. Anderson testified that through the rear view mirror of his car he observed appellees' car proceeding diagonally across Irving Park boulevard to the north, and Mrs. Anderson said that through the door and window she also saw appellees' car cross Irving Park boulevard and strike the truck of appellant.

In order to avoid confusion of the numerous parties involved, the plaintiffs in cause No. 10443 will be referred to as appellants, and Kaiser and his wife as appellees.

The sole ground urged for reversal of these two causes is that the verdicts were against the manifest weight of the evidence. The accident occurred at about 5:15 on the afternoon of the day in question. Kjelsson was driving the Ford V-8 passenger automobile in an easterly direction on Irving Park boulevard, and had as passengers in his car the appellees herein. At 4:30 p.m. they had left Barrington, Illinois, where they had attended a Christmas party that started December 24th. Substantially all the witnesses agreed that a heavy snow storm had been raging for some two or three hours prior to the accident. Appellees were driving in the south, or eastbound lane of Irving Park boulevard. Kaiser and his wife were proceeding in the north or westbound lane of Irving Park boulevard, in a Ford truck with an enclosed cab. Kaiser testified that he saw two cars approaching him from the west, and that when he was some 200 feet from the car farthest west it pulled out from behind the car which preceded it and came toward him in a diagonal direction and completely across Irving Park boulevard to the north or outer lane in which he was driving, and that the right hand side of both cars collided; that after the impact appellees' car was completely off Irving Park boulevard and up against a fence several feet north of the highway, facing in a westerly direction.

Martin M. Anderson and his wife, Corinne, of Joliet, Illinois, were the occupants of the eastbound car which immediately preceded appellees. Mr. Anderson testified that through the rear view mirror of his car he observed appellees' car proceeding diagonally across Irving Park boulevard to the north, and Mrs. Anderson said that through the rear and window she also saw appellees' car cross Irving Park boulevard and strike the trunk of appellant.

Ernest A. Hucksoll testified that he was driving a Chicago Surface Lines feeder bus in a westerly direction on Irving Park boulevard, about 200 feet behind Kaiser's truck, and saw a pair of headlights coming from the opposite direction toward Kaiser's truck diagonally across the road to the north side without changing its direction.

There is also the testimony of Max J. Altman, a police officer, who was called to the scene of the accident immediately after the collision. He said that he found appellees' car completely off Irving Park boulevard on the north side, facing in a westerly direction; that he then proceeded to the police station and talked to Kjelsaas, the driver of appellees' car, who told him that he had lost control of the car, that the accident was his fault, and that he would take care of it.

Although there is a conflict in some of the evidence, the witnesses are in substantial agreement that it was a stormy night, with a blizzard raging, accompanied by a northeast wind, which made driving exceedingly difficult. All the witnesses, except one, testified that as Kaiser approached the two cars coming from the west, appellees' car turned out of its lane in a northeasterly direction and proceeded across the highway toward Kaiser's truck.

Most of the witnesses testified that the accident happened on the north side of Irving Park boulevard, thus supporting the contention of appellant and the testimony of Mr. and Mrs. Anderson, Hucksoll and Altman, the police officer. Three of the appellees did not testify at all. Kjelsaas gave a different version of the collision.

There is also evidence that five days after the accident, Kjeleaaas made payments on the hospital bill, and it is argued by appellant that this circumstance, together with the fact that he did not join in the suit, furnished an inference that he con-

Witness A. Hucksoll testified that he was driving a Chicago
coupe like a leader bus in a westerly direction on Irving Park
boulevard, about 200 feet behind Kaiser's truck, and saw a pair of
headlights coming from the opposite direction toward Kaiser's truck
diagonally across the road to the north side without changing its
direction.

There is also the testimony of Max J. Jansen, a police
officer, who was called to the scene of the accident immediately
after the collision. He said that he found appellees' car completely
off Irving Park boulevard on the north side, facing in a westerly
direction; that he then proceeded to the police station and talked
to Kjelness, the driver of appellees' car, who told him that he had
lost control of the car, that the accident was his fault, and that
he would take care of it.

Although there is a conflict in some of the evidence, the
witnesses are in substantial agreement that it was a stormy night,
with a blizzard raging, accompanied by a northeast wind, which made
driving exceedingly difficult. All the witnesses, except one, testi-
fied that as Kaiser approached the two cars coming from the west,
appellees' car turned out of its lane in a northeasterly direction
and proceeded across the highway toward Kaiser's truck.

Most of the witnesses testified that the accident happened
on the north side of Irving Park boulevard, thus supporting the con-
tention of appellant and the testimony of Mr. and Mrs. Anderson.
Hucksoll and Jansen, the police officer. Three of the appellees
did not testify at all. Kjelness gave a different version of the
collision.

There is also evidence that five days after the accident,
Kjelness made payments on the hospital bill, and it is argued by
appellant that this circumstance, together with the fact that
he did not join in the suit, furnished an inference that he con-

sidered himself as the cause of the accident.

Aside from the contention that the verdicts were not against the manifest weight of the evidence, appellees argue that the negligence of the driver, Kjelsaas, cannot be imputed to the passengers in his car. Nevertheless, if his negligence was the proximate cause of the accident it would not justify verdicts against the Kaisers.

After a careful consideration of all the evidence, we are of the opinion that the verdicts are contrary to the manifest weight of the evidence and that the cause should be retried. Therefore, the judgments of the Superior court against Schiller Kaiser in cause No. 40440 are reversed and the cause is remanded for a new trial.

JUDGMENTS REVERSED AND CAUSE REMANDED
FOR A NEW TRIAL.

Burke, P. J., and Sullivan, J., concur.

figured himself as the cause of the accident.

Avoid from the contention that the verdict was not against the manifest weight of the evidence, especially as the fact that the negligence of the driver, Johnson, cannot be imputed to the passenger in his car. Nevertheless, it has been held that was the proximate cause of the accident it could not justify

verdict against the railroad.

After a careful consideration of all the evidence, we are of the opinion that the verdicts are contrary to the manifest weight of the evidence and that the cause should be reversed.

Therefore, the judgment of the superior court against the railroad is reversed and the cause is remanded

for a new trial.

THE COURT REVEREND AND HONORABLE
NOT A NEW TRIAL.

Burke, P. J., and Sullivan, J., concur.

40441

SCHILLER KAISER and
LOUISE KAISER,
Appellants,

v.

SIMON KJELSAAS,
Appellee.

33A
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

298 I.A. 627²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This cause was consolidated on appeal with case No. 40440, and grew out of the same accident that is set forth in the opinion in that proceeding, which has this day been filed.

The conclusions there reached are likewise applicable to this case. We are of the opinion that the verdict in this cause was contrary to the manifest weight of the evidence, and therefore the judgment of the Superior court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Burke, P. J., and Sullivan, J., concur.

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1894

THE UNITED STATES
OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C.

THIS REPORT WAS PREPARED BY SPECIAL AGENT IN CHARGE
AND WAS ONE OF THE FIRST REPORTS MADE IN THE FIELD BY THE
IN THE FIELD OF THE BUREAU OF LAND MANAGEMENT.
THE COMMISSIONER OF THE BUREAU OF LAND MANAGEMENT
THIS CASE, AS ONE OF THE FIRST CASES OF THE BUREAU
AND CONSIDERED AS THE FIRST CASE OF THE BUREAU
THE JUDGMENT OF THE BUREAU OF LAND MANAGEMENT
MADE FOR THE BUREAU.

DECEMBER 2, 1894

40460

LOUISE IWERT,
Appellee,

vs.

HENRY WEISROPF,
Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY

298 I.A. 627³

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was bitten by a dog owned by defendant and brought suit for damages resulting from the injuries sustained. She had a verdict and judgment for \$4,000, from which defendant appeals, urging as ground for reversal that the award was grossly excessive; that plaintiff failed to prove vicious tendencies on the part of the dog and knowledge thereof by defendant; that certain prejudicial testimony tending to prove scienter was erroneously admitted.

At the time suit was instituted plaintiff's name was Louise Iwert. She subsequently married Herbert Kunde. On the evening of July 17, 1933, she accompanied Kunde and Mrs. Grace Jacobs to a tavern which defendant had conducted at Harlem avenue south of Roosevelt road, in Forest Park, Illinois, for many years. They occupied a booth in the tavern to the rear of the bar room, where refreshments were served by defendant. His police dog, named "King", followed him into the tavern. As plaintiff, who was apparently fond of dogs, proceeded to pet him, the dog bit her, tearing off more than half of her right ear.

Plaintiff testified that immediately after she was bitten Kunde gave her several handkerchiefs and defendant came in with a towel, to stop the flow of blood, and remarked, "That is the second time the dog has bitten someone. Just two weeks ago he bit a boy in the seat of his pants." Counsel objected to the statement attributed to defendant, but the court admitted it as part of the

res gestae. It has been held that a declaration made or an act done after the happening of the principal fact may be admissible as part of the res gestae "when it is so intimately interwoven with the principal fact by the surrounding circumstances as to raise a reasonable presumption that it was made or done under the immediate influence of the principal transaction or event itself and is the spontaneous utterance or expression of thoughts created by, and springing out of, the transaction itself rather than the result of any premeditation or design." (22 Corpus Juris, sec. 545, pp. 455-6-7). The statement attributed to defendant was made almost immediately following the assault and was properly received in evidence under the numerous authorities cited in 22 Corpus Juris 443, et sec. Moreover the statement, if made, was an admission against interest and was admissible for this additional reason. Defendant denied having made such a statement, and testified that when plaintiff stepped out of the booth and was about to pet the dog he warned her to "leave him alone. Keep away from him"; that nevertheless she approached the dog, saying, "Beautiful dog, oh King" and then got down on one knee and put her arms around the dog, and that a moment later he heard her scream and say, "He bit me." The conflict in the evidence as to whether plaintiff had been warned and also as to the statement attributed to defendant, were properly questions of fact submitted to the jury, and if the jury believed that defendant made such a statement they were justified in finding that the tendencies of the dog to bite mankind, and knowledge thereof, had been sufficiently established to justify a verdict in plaintiff's favor.

There is no dispute as to the character and extent of the injuries sustained by plaintiff. She was immediately taken to the Oak Park hospital, where Dr. John W. Tope cauterized and bandaged the wound and administered first aid. The following day he ad-

res gestae. It has been held that a res gestae case is one in which the act is so closely connected with the transaction which it follows that it is part of the res gestae. "It is the fact that the act is so closely connected with the transaction which it follows that it is part of the res gestae." The statement attributed to defendant was made almost immediately following the assault and was promptly received in evidence under the hearsay exception stated in 22 Corpus Juris 443, et seq. Moreover the statement, if made, was an admission against interest and was admissible for this additional reason. Defendant denied having made such a statement, and testified that when plaintiff stepped out of the hotel and the count he put the dog he warned her to "leave him alone. Keep away from him"; that nevertheless she approached the dog and said, "Don't hurt me, King" and then got down on one knee and put her arms around the dog, and that a short time later he heard her scream and say, "He bit me." The conflict in the evidence as to whether plaintiff had been warned and also as to the statement attributed to defendant, were properly questions of fact submitted to the jury, and it is not believed that defendant was such a statement they were justified in finding that the foundation of the dog to bite was lacking, and knowledge thereof, had been sufficiently established to justify verdict in plaintiff's favor.

There is no dispute as to the character and extent of the injuries sustained by plaintiff. She was immediately taken to the Oak Park Hospital, where Dr. John W. Tope examined and bandaged the wound and testified that it was. The following day he de-

ministered the first of a series of twenty-one injections, known as the Pasteur treatment. Dr. Tope testified that about two-thirds of plaintiff's ear had been torn off. Two weeks after the injury he performed a plastic surgery operation, cutting a large flap from her neck and joining it to the ear, in an attempt to make a new ear. Plaintiff stayed at the hospital four or five days at the time, and returned in September, when the surgeon, under a general anaesthetic, "cut away the lower end of the pedicle, and brought that up." Dr. Tope last treated plaintiff in October, 1933, and stated that he then found the ear improved, but swollen from the operation, and that there was a 50% disability of the ear. "It might take two or three subsequent operations to relieve that condition. To rebuild the ear there will have to be some cartilage taken out of one of her ribs and put in the ear. Those edges will have to be freshened, and then we will have to attempt to bring up the skin. Sometimes it takes, sometimes it doesn't. I think the ear can be improved very radically, but it will show the mark of the scar and the ear will not be the same." Plaintiff's hearing was not affected. Her doctor bill was \$750. In addition to this she incurred expense for a series of X-ray treatments to remove the hair from the skin that had been grafted on her ear, and also hospital bills. She undoubtedly suffered considerable pain for several days after she was bitten, and if she desires to improve the appearance of her ear, further surgery and the expense incidental thereto will be required. Under the circumstances we do not think the verdict was excessive. The case was fairly tried, and we find no convincing reason for reversal. Therefore the judgment of the superior court should be affirmed, and it is so ordered.

AFFIRMED.

Burke, P. J., and Sullivan, J., concur.

In the Matter of the Estate of
 RICHARD T. CRANE, JR.,
 Deceased,
 - - - - -

ROBERT HANSEN,
 Appellee,
 vs.

JOHN K. PRENTICE and CONTINENTAL
 ILLINOIS NATIONAL BANK AND
 TRUST COMPANY OF CHICAGO,
 Executors,
 Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

298 I.A. 627⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Robert Hansen filed his petition in the Probate court of Cook county in the matter of the Estate of Richard T. Crane, Jr., deceased, averring that he was a beneficiary under Art. 5 of decedent's will and praying that the court direct the executors of said estate to pay him \$9,558.25, the alleged amount of his legacy, with interest thereon. The executors of said estate filed an answer to the petition denying that the petitioner was a beneficiary and that he was entitled to a legacy in the amount claimed or in any amount. The matter was tried before the Probate court, where an order was entered denying Hansen's petition. Upon appeal to the Circuit court of Cook county, where the cause was considered de novo, a judgment was entered, which, after finding that petitioner was a servant in the personal employment of the decedent at the time of his death, that the total amount of petitioner's wages during his employment by the decedent was \$9,558.25 and that the testator under and by virtue of the aforesaid Art. 5 of his will bequeathed to the petitioner the sum of \$9,558.25, directed that, out of the estate of decedent and in due course of the administration thereof, the executors pay said sum to Hansen with interest thereon at 5% from November 7, 1932. Thereafter, upon motion made by the executors to set aside the judgment and for a new trial, said judgment was set aside, the motion for a new trial was denied and judgment was entered modifying the previous judgment only as to the amount of the legacy, the modified

In the Matter of the Estate of
RICHARD T. GRAY, JR.,
Deceased,

ROBERT HANSEN,
Appellee,

vs.

JOHN K. PRENTICE and CO., INC.
ILLINOIS NATIONAL BANK AND
TRUST COMPANY OF CHICAGO,
Executors,
Appellants.

CLERK OF COURT
COOK COUNTY

238 I.A. 627

MR. JUSTICE CULLIVAN DELIVERED THE OPINION OF THE COURT.

Robert Hansen filed his petition in the Probate Court of Cook County in the matter of the Estate of Richard T. Gray, Jr., deceased, averring that he was a beneficiary under Art. 5 of the decedent's will and praying that the court direct the executors of said estate to pay him \$2,568.25, the alleged amount of his legacy, with interest thereon. The executors of said estate filed an answer to the petition denying that the petitioner was a beneficiary and that he was entitled to a legacy in the amount claimed or in any amount. The matter was tried before the Probate Court, where an order was entered denying Hansen's petition. Upon appeal to the Circuit Court of Cook County, where the cause was considered de novo, a judgment was entered, which, after finding that petitioner was a servant in the personal employment of the decedent at the time of his death, that the total amount of petitioner's wages during his employment by the decedent was \$2,568.25 and that the testator under and by virtue of the aforesaid Art. 5 of his will bequeathed to the petitioner the sum of \$2,568.25, directed that, out of the estate of decedent and in due course of the administration thereof, the executor pay said sum to Hansen with interest thereon at 6% from November 7, 1937. There-

after, upon motion made by the executors to set aside the judgment and for a new trial, said judgment was set aside, the motion for a new trial was denied and judgment was entered modifying the previous judgment only as to the amount of the legacy, the modified

judgment containing a finding that the total amount of petitioner's wages while in the employ of decedent was \$8,887. Judgment in the latter amount was entered because of the fact that during a part of the period of employment set forth in the petition, namely from August 1, 1922, to January 1, 1924, "Jerseyhurst," where petitioner was employed, was owned by testator and his brother Charles R. Crane as tenants in common, and Hansen was paid out of an account made up of funds jointly supplied by the two brothers, decedent, Richard T. Crane, Jr., and Charles R. Crane. The trial court properly found and held that wages paid by Charles R. Crane could not be added to wages paid by the testator to determine the amount of petitioner's legacy under Art. 5 of the decedent's will. This appeal is prosecuted by the executors to reverse the modified judgment for \$8,887, rendered in favor of petitioner on July 16, 1937.

The material allegations of Hansen's petition are as follows: "That Richard T. Crane, Jr., died on the 7th day of November, 1931, leaving a Last Will and Testament, one article of which reads as follows:

"Fifth: I give and bequeath to each servant in my personal employment at the time of my death a sum equal to the total amount of such servant's wages as such from the time of entry into my service to the date of my death."

"That petitioner was a servant in the personal employment of the decedent at 'Jerseyhurst' in Walworth County, Wisconsin, having entered into the service of decedent on August 1, 1922 and that he was so employed on the date of the death of the decedent.

"That the total amount of wages received by petitioner from decedent as such servant was \$9,558.25."

As heretofore stated respondents filed an answer to the petition denying that Hansen was a beneficiary under Art. 5 of the decedent's will and that he was entitled to a legacy in the amount claimed or in any amount.

The contentions of the executors as stated in

Judgment containing a finding that the total amount of petitioner's wages while in the employ of decedent was \$3,837. Judgment in the latter amount was entered because of the fact that during a part of the period of employment set forth in the petition, namely from August 1, 1932, to January 1, 1934, "Jerskyhurst," where decedent was employed, was owned by testator and his brother Charles R. Crane as tenants in common, and Hanson was paid out of an account made up of funds jointly supplied by the two brothers, decedent, Richard T. Crane, Jr., and Charles R. Crane. The trial court on a preliminary motion held that wages paid by Charles R. Crane could not be added to wages paid by the testator to determine the amount of petitioner's legacy under Art. 5 of the decedent's will. This appeal is prosecuted by the executors to reverse the modified judgment for \$3,837, rendered in favor of petitioner on July 18, 1937.

The material allegations of Hanson's petition are as follows: "That Richard T. Crane, Jr., died on the 7th day of November, 1931, leaving a last will and testament, one article of

which reads as follows:

"Fifth: I give and bequeath to each servant in my personal employment at the time of my death a sum equal to the total amount of such servant's wages as such from the time of entry into my service to the date of my death."

"That petitioner was a servant in the personal employment of the decedent at 'Jerskyhurst,' in Alameda County, Wisconsin, having entered into the service of decedent on August 1, 1932, and that he was so employed on the date of the death of the decedent.

"That the total amount of wages received by

petitioner from decedent as such servant was \$3,838.26."

As heretofore stated respondents filed an answer to the petition denying that Hanson was a beneficiary under Art. 5 of the decedent's will and that he was entitled to a legacy in the amount claimed or in any amount.

The contentions of the executors as stated in

their brief are that, "though admittedly the petitioner was, by the very nature of his labor, a servant, he was not a servant of this testator within the intention of this testator as expressed in Art. 5 of his Will. And it is our contention that the trial court erred, as a matter of law, in concluding that petitioner was a servant in the personal employment of testator, and that he was such at the time of testator's death."

Petitioner's position is that "he qualifies as a servant in the personal employment of decedent at the time of testator's death by virtue of his employment by testator at 'Jerseyhurst,' a summer estate owned by the testator on Lake Geneva in the State of Wisconsin and that therefore he was a legatee under the Fifth Article of testator's Will."

The evidence presented to the Circuit court is contained principally in a stipulation entered into between the petitioner and respondents and their respective counsel. The stipulated facts are set forth in the abstract of record as follows:

"Robert Hansen, petitioner, by his attorney, George William Sullivan, and Cornelius Crane, John K. Prentice and Continental Illinois National Bank and Trust Company of Chicago, the Executors of the above entitled estate, respondents, by their attorneys, Ashcraft & Ashcraft, DO HEREBY STIPULATE AND AGREE that the following are facts material to the matter of the petition of said petitioner:

"Petitioner claims to be a legatee by virtue of the following clause of the Last Will and Testament of Richard T. Crane, Jr., deceased, which follows:

"Fifth: I give and bequeath to each servant in my personal employment at the time of my death a sum equal to the total amount of such servant's wages as such from the time of entering into my service to the date of my death."

"Richard T. Crane, Jr., (hereinafter sometimes called Testator), died in New York City on November 7, 1931, at the age of 58 years. He had been in the East about two weeks prior to October 24, 1931, on which date he was stricken with the illness resulting in his death. His

their brief are that, "though admittedly the petitioner was, by the very nature of his labor, a servant, he was not a servant of this testator within the intension of this testator as expressed in Art. 2 of his Will. And it is our contention that the trial court erred, as a matter of law, in concluding that petitioner was a servant in the personal employment of testator, and that he was such at the time of testator's death."

Petitioner's position is that "no question as to a servant in the personal employment of decedent at the time of testator's death by virtue of his employment by testator at 'Lansdowne', a summer estate owned by the testator on Lake Geneva in the State of Wisconsin and that therefore he was a legatee under the Fifth

Article of testator's Will."

The evidence presented to the Circuit Court is contained principally in a stipulation entered into between the petitioner and respondents and their respective counsel. The stipulated facts are set forth in the abstract of record as follows:

"Robert Hansen, petitioner, by his attorney, George William Sullivan, and Cornelius Crane, John K. Prentice and Continental Illinois National Bank and Trust Company of Chicago, the executors of the above entitled estate, respondents, by their attorneys, Ashcroft & Ashcroft, DO HEREBY STIPULATE AND AGREE that the following are facts material to the matter of the petition of said petitioner:

"Petitioner claims to be a legatee by virtue of the following clause of the last Will and Testament of Richard T. Crane, Jr., deceased, which follows:

"Fifth: I give and bequeath to each servant in my personal employment at the time of my death a sum equal to the total amount of such servant's wages as such from the time of entering into my service to the date of my death."

"Richard T. Crane, Jr. (hereinafter sometimes called Testator), died in New York City on November 7, 1931, at the age of 58 years. He had been in the West about two weeks prior to October 24, 1931, on which date he was stricken with the illness resulting in his death. His

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city home was at 1550 Lake Shore Drive, in Chicago. His summer residence was located at Ipswich, Massachusetts, upon an ocean front estate of 1900 acres which he acquired by purchase in 1910, named it 'Castle Hill,' and improved it with a residence of some fifty rooms, outbuildings, swimming pool, tennis court, etc. He also had a residence at Jekyl Island, Georgia, where he and his family spent much time, particularly during winter seasons. His principal place of business was in Chicago, he having been, for practically all of his adult life, an official of Crane Co. of that city, and for the last seventeen years of his life, its President.

"On January 8, 1912, testator and his brother, Charles R. Crane, acquired title to the country place of their father, Richard T. Crane, Sr., at Lake Geneva, known as 'Jerseyhurst,' the same being devised to them, as residuary legatees, in the Will of said Richard T. Crane, Sr., who died on said date.

"Jerseyhurst consisted of 80.3 acres of ground, having a 1935 foot frontage on Lake Geneva. It was improved by the original residence used by said Richard T. Crane, Sr., the father, during his lifetime, by his widow thereafter until 1922, and unused thereafter until the death of Richard T. Crane, Jr., except for one or two summer seasons by a niece of Richard T. Crane, Jr. Also there were thereon three other residences, a superintendent's cottage, a boat-house, miscellaneous garages and out-buildings, a greenhouse and a barn.

"By the Will of Richard T. Crane, Sr., his widow was given a life estate in this property, except as to those houses customarily occupied by some of his children and a daughter-in-law, as to which said children and daughter-in-law were given the right to continued occupancy for their lives or for the life of his widow. Also by said Will of their father, Richard T. Crane, Jr., and Charles R. Crane were charged, upon accepting the devise, with the following:

"To pay all the cost and expense of keeping all of my said country place at Lake Geneva, Wisconsin, and all the houses and other buildings thereon (hereinbefore referred to in Subdivision Second of PARAGRAPH SECOND of this my WILL), in good order and repair, and to keep up the same in the same way and condition as I have heretofore kept the same, and to supply to my said wife and my other children occupying houses thereon, the vegetables, fruits, milk and all other supplies from said place for the use of themselves and families, in the same manner as I have heretofore been accustomed to supply the same, and also to keep up and operate the steamer heretofore used in connection with said place and supply the men for the same as I have heretofore done, and also to pay all taxes, special assessments and all other public charges on said country place and on all the houses and other buildings thereon. It is, however, my intention that my said sons shall not be under any obligation to expend any money for the household expenses of my said wife, Emily Hutchinson Crane, or of any of my children, paid or incurred in connection with any of said houses or buildings."

"On December 2, 1912, Charles R. Crane and Richard T. Crane, Jr., entered into an agreement with the widow of Richard T. Crane, Sr., whereby they were released from their obligation under the Will, as aforesaid, including payment of taxes on and maintenance of Jerseyhurst which agreement continued in effect until August 1, 1922. On this date by an agreement of June 2, 1922, between Charles R. Crane and Richard T. Crane, Jr., and the said widow, she was released from the obligation of maintenance of Jerseyhurst and payment of taxes thereon, and she conveyed her interest in said property to said Charles R. Crane and Richard T. Crane, Jr., who reassumed the

city home was at 1850 Lake Shore Drive, in Chicago. His summer residence was located at Ipswich, Massachusetts, upon an ocean front estate of 1900 acres which he acquired by purchase in 1910, named it 'Castle Hill,' and improved it with a residence of some fifty rooms, outbuildings, swimming pool, tennis court, etc. He also had a residence at Jekyll Island, Georgia, where he and his family spent much time, particularly during winter seasons. His principal place of business was in Chicago, he having been, for practically all of his adult life, an official of Sears & Roebuck, and for the last seventeen years of his life, its President.

"On January 8, 1912, testator and his brother, Charles H. Crane, acquired title to the country place of their father, Richard T. Crane, Sr., at Lake Geneva, known as 'Jacksborough,' the same being devised to them, as residuary legatees, in the will of said Richard T. Crane, Sr., who died on said date.

"Jacksborough consisted of 80.5 acres of ground, having a 1935 foot frontage on Lake Geneva. It was improved by the original residence used by said Richard T. Crane, Sr., the father, during his lifetime, by his widow thereafter until 1922, and owned thereafter until the death of Richard T. Crane, Sr., except for one or two summer seasons by a niece of Richard T. Crane, Sr., also there were thereon three other residences, a carpenter's cottage, a boat-house, miscellaneous garages and out-buildings, a greenhouse and a barn.

"By the will of Richard T. Crane, Sr., his widow was given a life estate in this property, except as to those houses customarily occupied by some of his children and a daughter-in-law, as to which said children and daughter-in-law were given the right to continue occupancy for their lives or for the life of his widow. The will of their father, Richard T. Crane, Sr., and Charles H. Crane were charged, upon accepting the devise, with the following:

"To pay all the cost and expense of keeping all of my said country place at Lake Geneva, Jacobson, and all the houses and other buildings thereon (hereinafter referred to as 'Jacksborough' of 1935 GRAP 2-10 of this my will), in good order and repair, and to keep up the same in the same way and condition as I have heretofore kept the same, and to employ to my said wife and my other children occupying houses thereon, the vegetables, fruits, milk and all other supplies from said place for the use of the aforesaid families, in the same manner as I have heretofore been accustomed to supply the same, and also to keep up and operate the steam heretofore used in connection with said place and supply the men for the same as I have heretofore done, and also to pay all taxes, special assessments and all other public charges on said country place and on all the houses and other buildings thereon. It is, however, my intention that my said wife shall not be under any obligation to expend any money for the household expenses of my said wife, Emily Hutchinson Crane, or of any of my children, paid or incurred in connection with any of said houses or buildings."

"On December 8, 1912, Charles H. Crane and Richard T. Crane, Jr., entered into an agreement with the widow of Richard T. Crane, Sr., whereby they were released from their obligation under the will of said Richard T. Crane, Sr., including payment of taxes on and maintenance of Jacksborough, which agreement continued in effect until August 1, 1922. On this date by an agreement of June 2, 1922, between Charles H. Crane and Richard T. Crane, Jr., and the said widow, she was released from the obligation of maintenance of Jacksborough and payment of taxes thereon, and she conveyed her interest in said property to said Charles H. Crane and Richard T. Crane, Jr., who reassumed the

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obligation of maintenance and payment of taxes aforesaid. On January 1, 1924, by an agreement between Charles R. Crane and Richard T. Crane, Jr., title to said property was conveyed to Richard T. Crane, Jr., and by said agreement he assumed the performance of all the obligations with reference to this country place, with which he and his brother, Charles R. Crane, were charged by their father's Will.

"In pursuance of the last mentioned agreement, Richard T. Crane, Jr., paid the taxes on and the cost of maintaining these premises until his death, except that the occupants of the various houses paid for the decorating and remodeling of the houses occupied by them.

"Richard T. Crane, Jr., also, after January 1, 1924, until his death, carried and paid the premium on Workmen's compensation and employers liability insurance, the same having been procured by his personal secretary, John K. Prentice, pursuant to general direction of Mr. Crane to cover all possible liabilities and losses, direct and contingent, for which he might be responsible in connection with all his properties.

"During all the period from August 1, 1922, to the death of Richard T. Crane, Jr., this property was occupied and used almost entirely by nephews and nieces of Charles R. Crane and Richard T. Crane, Jr., and by the daughter-in-law referred to in Richard T. Crane, Sr.'s Will. Richard T. Crane, Jr., visited the place some two, three or four times during some but not all of the years during the period aforesaid, and then only for a week-end or a day as an invited guest of one of the resident families, except when he was there for two Crane Co. outings of a day's duration held during these periods on the occasions of the 70th and 75th anniversaries of the founding of the company.

"During the period from August 1, 1922, to the date of the death of Richard T. Crane, Jr., various persons were employed and worked on the premises aforesaid under the direction of a superintendent, Axel Johnson. This Superintendent was paid by Charles R. Crane and Richard T. Crane, Jr. from August 1, 1922 to January 1, 1924, and thereafter by Richard T. Crane, Jr., until his death.

"The manner of payment of the wages of the persons employed as aforesaid upon these premises was from August 1, 1922 to January 1, 1924, as follows: At the end of each month the Superintendent submitted the payrolls to H. P. Bishop, former Secretary of Richard T. Crane, Sr., and acting for Charles R. Crane and Richard T. Crane, Jr., and he wrote a check to each individual on an account in his name in the First National Bank of Lake Geneva, funds for which were jointly provided by Charles R. Crane and Richard T. Crane, Jr. After January 1, 1924, the same manner of payment was used, except that the payrolls were submitted to John K. Prentice, Secretary to Richard T. Crane, Jr. Mr. Prentice, drew his check to each individual on a similar account in his name in the First National Bank of Lake Geneva, funds for which were provided by Richard T. Crane, Jr. Printed on the upper left hand corner of the form of check used were the name and address of testator.

"The properties on Lake Geneva were largely summer estates. It was the custom on these estates to reduce the staff of employes during the winter months, i.e., to retain, at most, only a part thereof.

"This was the custom at Jerseyhurst. Prior to January 1, 1930, it was the practice there for four men, in addition to the superintendent, to work the year around. In addition to these about seven men worked from about the middle of March until some time in December

obligation of maintenance and payment of taxes otherwise. On January 1, 1934, by an agreement between Charles E. Grane and Richard T. Grane, Jr., title to said property was conveyed to Richard T. Grane, Jr., and by said agreement he assumed the performance of all the obligations with reference to this country place, with which he and his brother, Charles E. Grane, were charged by their father's Will.

"In pursuance of the last mentioned agreement, Richard T. Grane, Jr., paid the taxes on and the cost of maintaining these premises until his death, except that the accounts of the various houses paid for the decorating and remodeling of the houses occupied by them.

"Richard T. Grane, Jr., also, after January 1, 1934, until his death, carried and paid the premium on a company and employers liability insurance, the same having been procured by his personal secretary, John E. Brantley, pursuant to general direction of R. Grane to cover all possible liabilities and losses, direct and contingent, for which he might be responsible in connection with all his properties.

"During all the period from August 1, 1932, to the death of Richard T. Grane, Jr., this property was occupied and used almost entirely by himself and his wife, Charles E. Grane and Richard T. Grane, Jr., and by the daughter-in-law referred to in Richard T. Grane, Jr.'s Will. Richard T. Grane, Jr., visited the place some two, three or four times during some but not all of the years during the period aforesaid, and was only for a week-end on a day as an invited guest of one of the resident families, except when he was there for two or three of a day, duration held during these periods on the occasions of the 75th and 76th anniversaries of the founding of the company.

"During the period from August 1, 1932, to the date of the death of Richard T. Grane, Jr., various persons were employed and worked on the premises aforesaid under the direction of a superintendent, Axel Johnson. This superintendent was paid by Charles E. Grane and Richard T. Grane, Jr. from August 1, 1932 to January 1, 1934, and thereafter by Richard T. Grane, Jr. until his death.

"The manner of payment of the wages of the persons employed on the premises upon these premises was from August 1, 1932 to January 1, 1934, as follows: At the end of each month the superintendent submitted the payrolls to R. E. Brantley, former secretary of Richard T. Grane, Jr., and acting for Charles E. Grane and Richard T. Grane, Jr., and he wrote a check to each individual on an account in his name in the First National Bank of Lake Geneva, funds for which were supplied by Charles E. Grane and Richard T. Grane, Jr. After January 1, 1934, the same manner of payment was used, except that the payrolls were submitted to John E. Brantley, secretary to Richard T. Grane, Jr. Brantley, drew his check to each individual on a similar account in his name in the First National Bank of Lake Geneva, funds for which were provided by Richard T. Grane, Jr. Printed on the upper left hand corner of the form of check used were the name and address of testator.

"The properties on Lake Geneva were largely summer estates. It was the custom on these estates to reduce the staff of employees during the winter months, i.e., to retain, if need, only a part thereof.

"This was the custom at Lake Geneva. Prior to January 1, 1930, it was the practice there for long men, in addition to the superintendent, to work the year around. In addition to these about seven men worked from about the middle of March until some time in December

in each year and still others, in varying numbers, were engaged occasionally. Also, at some time during January and/or February in each year, the men who worked from March to December returned, at the summons of the superintendent, to harvest ice for the estate ice house. Also, additional men were summoned for this purpose when needed.

"On January 1, 1930 the winter staff was reduced to three men, in addition to the superintendent, and for the winter of 1930-1931 it was reduced to two men, in addition to the superintendent; the number of men working from March to December was reduced to five in both years; and the occasional labor was almost eliminated in these two years except for harvesting ice.

"The petitioner was engaged at Jerseyhurst as hereinafter set forth, and was paid, in the manner above stated, the amounts and at the rates hereinafter set forth: [Here followed the number of days of petitioner's employment each year as gardener on the "Jerseyhurst" estate from August 1, 1922, to October 17, 1931, his rate of wage per day and the total amount of wages received by him per year during the aforementioned period.]

"In October, 1931, the petitioner and all other employees at Jerseyhurst except those comprising the winter staff were laid off by the superintendent. Said superintendent had no express direction to take this action on the date he did or any other particular date, but did so at a date earlier in this year than in previous years pursuant to a general plan, expressed in an operating program devised in October, 1929, and hereinafter set forth, to reduce expenses to testator, and also pursuant to discussions, regarding reduction of expenses, had early in 1931 with Charles R. Crane, II and Mr. Prentice, and as a result of which the superintendent was told to lay off all employees except the winter staff as early in the fall of that year as he could and yet have the essential work done.

"On February 15, 1928, testator wrote to two of his nephews who were occupying houses at Jerseyhurst, as follows:

"Feb. 15, 1928.

C. R. Crane, 2nd,
A. F. Cartz, Jr.

For some time I have been thinking of dividing Jerseyhurst between you, but am not quite sure it could be done in a satisfactory way without you consulting with each other and finally arriving at a plan to submit to me.

A medial line from the center of the Lake frontage back to the main road would give the same area to each, and in a general way I would think Charles would take the East and Frederick the West end.

It is a matter that should be looked at in a broad way and with no particular significance one way or the other as to absolute equality.

In this connection I would have to have a release from Aunt Kate and Aunt Jessie, which of course could readily be obtained. Also, in the event of either one wishing to sell the property I would want a stipulation that it would be first offered to some member of the family, preferably your Aunts and Uncles.

entire last house. Also, additional men were summoned for this purpose when needed.

"On January 1, 1950 the witness still was treated as a man, in addition to his apartment, and on the winter of 1930-1931 it was reduced to two men in addition to the apartment; the number of men working from a top to bottom was reduced to five in both years; and the occupancy of Japan was eliminated in these two years and not decreasing it."

"The petitioner was ordered to testify at a hearing in 1951, his name of a perjury and the total amount of wages received by him per year during the above-referenced period. On the "testimony" estate from August 1, 1935, to October 15, number of days of petitioner's employment each year as indicated and at the rates hereinafter set forth. It was followed the set forth, and a bill, in the matter above stated, the matter."

[illegible]

"On February 12, 1962, before 10:00 of the morning who were occupying houses at Tarnobrzeg, as follows:

[illegible]

For some time I have been thinking of visiting Jerusalem between you, but I am not quite sure it could be done in a satisfactory way without your consultation with some other people finally arriving at a plan to visit to me.

32 The main road would give the people of the Lake Umbagog area a direct route to the lake from the north and in a direct way. It would also give the people of the Lake Umbagog area a direct route to the lake from the south and in a direct way.

It is a matter of fact that it is a broad way and with no particular assistance one way or the other as to what the

family, preferably your family and friends.
a statement on that it would be first offered to some member of the
in the event of either no claim to all the property I would want
Kate and Aunt Kate, which of course could readily be obtained. Also,
In this connection I would have to have a release from Aunt

It is impossible for me to have any use of the place and naturally I wouldn't want to have the burden of management or the cost carried on for any considerable length of time. In order to help the carrying charges for a few years I would be willing to give you each \$10,000 a year for five years, after which time I would be relieved from any further obligation on the place.

It can be much more economically managed by you as there are certain things unnecessary to keep up for your comfort and convenience.

As Johnson has been such a faithful person to the family I would expect you both to use his services for at least during the period for which I would help to maintain it.

Jerseyhurst has been in the family so long and has meant so much in the lives of all of us that I am anxious to perpetuate it as long as we can within reason. When you think of the two or three generations that have received so much benefit from it I look on it as somewhat of a responsibility on you to conduct it well and in a proper manner.

Think this matter over and I will take it up with you at some future time.

Affectionately,
(Signed) Uncle Dick.'

"This arrangement did not materialize, one nephew being unable to accept the proposal at that time.

"John K. Prentice, as Secretary to Richard T. Crane, Jr., prior to and during the period from August 1, 1922, to Mr. Crane's death, was familiar with practically all of Mr. Crane's personal, as well as business affairs, having general and specific duties with respect thereto. Among his many duties, he handled Mr. Crane's correspondence, looked after his properties, kept his records and accounts and paid his bills, and, as heretofore stated, and otherwise, handled certain payrolls for Mr. Crane.

"In addition to paying wages of petitioner and others employed at Jerseyhurst, as heretofore described, Mr. Prentice looked after this property to some extent, keeping accounts and reporting to Mr. Crane thereon from time to time.

"At sometime during the year 1929, testator requested Mr. Prentice to prepare, in conjunction with Charles R. Crane, II and Mr. Johnson, the Superintendent, a program of management and operation of this property for the purpose of reducing the expense thereof to testator. * * *

"This program was pursued and carried out, at least in part, prior to the death of Richard T. Crane, Jr., Charles R. Crane, II supervising it. Prior to the year 1930, the cost of maintenance, taxes, etc., paid by Richard T. Crane, Jr., was approximately \$29,000 per year. In 1930, this was reduced to approximately \$24,000 and in 1931 it was reduced to approximately \$15,000.

"In the years 1926, 1928 and 1930, testator made gifts of Crane Co. common stock to some four thousand employees of Crane Co. Each employee, who had worked continuously for ten full

It is impossible for me to have any use of the place and naturally I wouldn't want to have the burden of maintaining the cost carried on for any considerable length of time. In order to help the carrying charges for a few years I would be willing to give you each \$10,000 a year for five years, after which time I would be relieved from any further obligation on the place.

It can be much more economically managed if you and there are certain things unnecessary to keep up for your comfort and convenience.

As Johnson has been such a faithful person to the family I would expect you both to use his services for at least during the period for which I would help to maintain it.

Johnson has been in the family so long and has meant so much in the lives of all of us that I am anxious to retribute it as long as we can within reason. Now you think of the two or three generations that have received so much benefit from it I look on it as somewhat of a responsibility on you to conduct it well and in a proper manner.

Think this matter over and I will take it up with you at some future time.

Respectfully,
(Signed) Jessie Dick.

"This arrangement did not materialize, one nephew being unable to accept the proposal at that time. John M. Prentice, a secretary to Richard T. Crane, Jr., prior to and during the period from August 1, 1920, to Mr. Crane's death, was familiar with practically all of Mr. Crane's business, as well as business affairs, having acted as specific trustee with respect thereto. Among his many duties, he handled Mr. Crane's correspondence, looked after his properties, kept his records and accounts and paid his bills, and, as heretofore stated, and otherwise handled certain payrolls for Mr. Crane."

"In addition to paying wages of employees and there employed as heretofore described, Mr. Prentice looked after this project to some extent, keeping accounts and reporting to Mr. Crane thereon from time to time."

"At sometime during the year 1921, heretofore mentioned Mr. Prentice to prepare, in conjunction with Charles T. Crane, Jr. and Mr. Johnson, the President, a program of management and operation of this property for the purpose of reducing the expenses thereof to a minimum."

"This program was drawn and carried out, at least in part, prior to the death of Richard T. Crane, Jr., Charles M. Crane, Jr. supervising it. Prior to the year 1920, the cost of maintenance, taxes, etc., paid by Richard T. Crane, Jr., was approximately \$24,000 per year. In 1920, this was reduced to approximately \$15,000 and in 1921 it was reduced to approximately \$12,000."

"In the years 1922, 1923 and 1924, heretofore mentioned gifts of Crane Co. common stock to some four thousand employees of Crane Co. Each employee, who had worked continuously for the full

years, was given ten shares plus one share for each year over ten up to twenty-five, and two shares for each year over twenty-five. In 1926 and 1928 less than one year but more than six months was considered a full year for all purposes; in 1930 this major fraction was considered a full year only for the years over ten.

"At the time of the 1926 gift, Mr. Prentice asked testator if he wished to include his personal employees. Testator asked Mr. Prentice to go over with him the names of these employees, of which there were approximately forty. This was done with the result expressed in the following letter * * * written by Mr. Prentice to Mr. Evenson, Treasurer of Crane Co. at Chicago:

"Castle Hill Farm.
Argilla Rd.
Ipswich, Massachusetts.

January 2nd, 1926.

"Dear Walter:

"Will renew my acquaintance with the typewriter at your expense. Mr. Crane authorizes the following on the gift stock list.

"Bertha Johnson, commenced 10/13/08, 17 years 2 mos
1550 Lake Shore Drive, Chicago.

"Kate Sime, commenced 3/10/10, 15 years, 9 mos.
1550 Lake Shore Drive, Chicago, Ill.

"Angus MacLeod, commenced Sept. 1912, 13 years 4 mos.
Castle Hill, Ipswich, Mass.

"Axel Johnson, commenced 9/1/1895, 30 years, 4 mos.
Jerseyhurst, Lake Geneva, Wis.

"There may be one or two others at Lake Geneva. Consult Mr. Bishop and add those he may give you.

"The President thought your bulletin, etc. all right. He is debating in his mind the Trenton Potteries, Crane-O'Fallon, Crane Enamelware Co., as to whether he wants to give them the benefit of service prior to affiliation with Crane Co. Will decide before he sails and I will inform you.

"None of these have been advised of their inclusion. Will tell McLeod and Sime while here. When the certificates are sent they should be informed on the reason of the gift and that Mr. Crane directed that they should be included because of their personal service for the family.

"He suggested a uniform date for all the gift certificates to indicate on your records that all of such date were from him, and to more easily disclose any who may sell this particular stock. Perhaps using Feb. 1st, or any arbitrary date, on which no other certificates should be issued.

"As I re-read this note how casual my typewriting has become.

years, as given ten shares plus one share for each year over ten up to twenty-five, and two shares for each year over twenty-five. In 1938 and 1939 less than one year but more than six months was considered a full year for all purposes; in 1939 this latter fraction was considered a full year only for the years over ten.

"At the time of the 1938 gift, Mr. Prentice asked the testator if he wished to include his personal employees. Testator asked Mr. Prentice to go over with him the names of these employees, of which there were approximately forty. This was done with the result expressed in the following letter: * * * written by Mr. Prentice to Mr. Benson, Treasurer of Crane Co. at Chicago:

"Castle Hill Farm,
Arling Rd.,
Ipswich, Massachusetts.

January 2nd, 1938.

"Dear Walter:

"Will renew my acquaintance with the typewriter list your expense. Mr. Crane authorizes the following on the gift stock list.

"Bertha Johnson, commenced 10/13/08, 14 years 2 mos.
1880 Lake Shore Drive, Chicago.

"Kate Sims, commenced 3/10/10, 15 years, 9 mos.
1880 Lake Shore Drive, Chicago, Ill.

"Anna MacLeod, commenced Sept. 1915, 13 years 4 mos.
Castle Hill, Ipswich, Mass.

"Axel Johnson, commenced 8/1/1887, 30 years, 4 mos.
Tarrytown, Lake Geneva, Wis.

"There may be one or two others at Lake Geneva. Get out Mr. Bishop and add those he may give you.

"The President thought your bulletin, etc. all right. He is debating in his mind the Trenton Pottery, Crane-U'Fallon, Crane Enamelware Co., as to whether he wants to give them the benefit of service prior to affiliation with Crane Co. Will decide before he calls and I will inform you.

"None of these have been advised of their inclusion. Will tell MacLeod and Sims while here. Then the certificates are sent they should be informed on the reason of the gift and that Mr. Crane suggested that they should be included because of their personal service for the family.

"He suggested a uniform date for all the gift certificates to indicate on your records that all of such date were from him, and to more easily disclose any who may sell this particular stock. Perhaps next Feb. 1st, or any arbitrary date, on which no other certificates should be issued.

"As I re-read this note how casual my typewriting has become.

"Mrs. Bristol's letter is sent you without comment.

Yours,
"J. K. P.

"In accordance with the above letter, Mr. Bishop requested of the Jerseyhurst Superintendent information respecting those having ten years or more continuous service there, and, having Mr. Johnson's list, he prepared and handed to Mr. Prentice his list of names and data. This, Mr. Prentice considered with testator, who approved the list, and Mr. Prentice advised Mr. Evenson. Following is Mr. Bishop's list and thereon the direction of Mr. Prentice * * *:

"February 4, 1926.

"Employee of Mr. R. T. Crane, Jr., at Lake Geneva, Wisc. having a continuous record of 10 years or over.

| Name | Year this record begins | Number of years | Address |
|---------------------|-------------------------|-----------------|---------------------------------|
| Daniel M. Kalahar | 1887 | 39 | Lake Geneva, Wisc. R.F.D. #2 |
| Axel Johnson | 1896 | 30 | Jerseyhurst, Lake Geneva, Wisc. |
| Robert J. Hansen | 1905 | 21 | Lake Geneva, Wisc. R.F.D. #2 |
| John George Ebbeson | 1907 | 19 | Lake Geneva, Wisc. R.F.D. #2 |
| Henry Krause | 1909 | 17 | Lake Geneva, Wisc. R.F.D. #2 |
| Martin Tillberg | 1913 | 10 | Lake Geneva, Wisc. R.F.D. #2 |
| Swan A. Pearson | 1913 | 13 | Lake Geneva, Wisc. |
| M. Dudley Barrett | 1914 | 12 | Lake Geneva, Wisc. R.F.D. #2 |

"Chicago, Illinois,
February 5, 1926.

"Mr. Walter Evenson,
Treasurer,

"Mr. Crane directs that you issue Common stock to the men listed above, in the same manner as you are issuing his gift stock to employees of the Company. Please deliver all of the certificates to me.

"J. K. Prentice,
"Assistant Secretary.

" * * *

"The testator, during his lifetime, made numerous contributions for charitable and other philanthropic purposes."

The major question presented is whether petitioner was a servant in the personal employment of testator within the contemplation of the language used by said testator in Art. 5 of his last will and testament. Since there is no substantial conflict in the evidence the issue as to whether it was the intention of the testator to include petitioner as a beneficiary under the aforesaid Art. 5 resolves itself into a construction of the facts as bearing upon the provision of the will in question.

"Mrs. Bristol's letter is sent you without comment."

Yours,
"J. P."

"In accordance with the above letter, Mr. Bishop requested of the Jerseyhurst Superintendent information respecting those having ten years or more continuous service there, and, having Mr. John-son's list, he prepared and handed to Mr. Prentice his list of names and date. This, Mr. Prentice considered with testator, who approved the list, and Mr. Prentice advised Mr. Hanson. Following is Mr. Bishop's list and thereon the direction of Mr. Prentice * * *"

"February 4, 1928."

"Employees of Mr. R. T. Crane, Jr., at Lake Geneva, Wisc., having a contin-
uous record of 10 years or over."

| Year this record begins | Number of Years | Ad. Name |
|-------------------------|-----------------|---------------------------------|
| 1887 | 39 | Lake Geneva, Wisc. R. T. D. 42 |
| 1898 | 30 | Jerseyhurst, Lake Geneva, Wisc. |
| 1908 | 21 | Lake Geneva, Wisc. R. T. D. 42 |
| 1917 | 10 | Lake Geneva, Wisc. R. T. D. 42 |
| 1922 | 15 | Lake Geneva, Wisc. R. T. D. 42 |
| 1912 | 16 | Lake Geneva, Wisc. R. T. D. 42 |
| 1913 | 15 | Lake Geneva, Wisc. |
| 1914 | 14 | Lake Geneva, Wisc. R. T. D. 42 |

"Chicago, Illinois,
February 5, 1928."

"Mr. Walter Hanson,
Treasurer."

"Mr. Crane directs that you issue down stock to the men listed above, in the same manner as you are issuing his gift stock to employees of the Company. Please deliver all of the certificates to me."

"J. P. Prentice,
Assistant Secretary."

" * * *"

"The testator, during his lifetime, made numerous contributions for charitable and other philanthropic purposes."

The major question presented is whether petiti-
on of the language used by said testator in Art. 5 of his last will and testament. Since there is no substantial conflict in the evidence the is-
sue as to whether it was the intention of the testator to include petiti-
on as a beneficiary under the aforesaid Art. 5 resolves itself into a con-
struction of the facts as bearing upon the provision of the will in question
er was a servant in the personal employment of testator within the contempla-

In the case In the Matter of the Estate of Richard T. Crane, Jr., Deceased, Luke Petre et al., v. John K. Prentice and Continental Illinois National Bank and Trust Company of Chicago, Executors, 292 Ill. App. 573, decided by this court December 14, 1937, six employees of the same decedent, also filed petitions in the Probate court of Cook county in the matter of said estate for amounts claimed to be due them as intended beneficiaries under Art. 5 of decedent's will. These employees were assigned to work in 1925 building a private golf course on land owned by decedent contiguous to his Castle Hill summer estate at Ipswich, Massachusetts, and were assigned thereafter, until Mr. Crane's death, to the care and maintenance of said golf course. From April 1, of each year to the end of that year they performed the work assigned to them on the golf course by the superintendent of decedent's Castle Hill estate, and from January 1, to April 1, of each year performed such duties on Castle Hill estate as were assigned to them by said superintendent.

To the claims advanced by these employees that they were beneficiaries within the contemplation of Art. 5 of decedent's will and entitled to a legacy to the extent indicated in said article, one of the objections interposed by the executors of said decedent's estate was that the employees involved therein were not servants in the personal employment of Richard T. Crane, Jr. As heretofore shown, that is the executors' principal contention in the instant case. In the Petre case, supra, in holding that the petitioners there were servants in the personal employment of Mr. Crane and as such were entitled under Art. 5 of his will to the legacy therein provided, we said at pp. 583-4-5-6:

,"Upon oral argument counsel for executors argued that the word 'servant' was confined to menials who had been in daily contact with Mr. Crane and served his personal wants; that words of general import must give way to words of special import; that 'personal' qualifies 'servants' and means personal servants and not all people

In the case in the matter of the estate of

Richard T. Crane, Jr., Deceased, like Petre et al., v. John L. Brown-

and Continental Illinois National Bank and Trust Company of

Chicago, Executors, 292 Ill. App. 173, decided by this court December

14, 1937, six employees of the same decedent, also filed petitions in

the Probate court of Cook county in the matter of said estate for a-

mounts claimed to be due them as intended beneficiaries under Art. 5 of

decedent's will. These employees were assigned to work in 1928 build-

ing a private golf course on land owned by decedent contiguous to his

Castle Hill summer estate at Oakton, Massachusetts, and were assigned

thereafter, until Mr. Crane's death, to the care and maintenance of

said golf course. From April 1, of each year to the end of that year

they performed the work assigned to them on the golf course by the

superintendent of decedent's Castle Hill estate, and from January 1, to

April 1, of each year performed such duties as Castle Hill estate as

were assigned to them by said superintendent.

To the claims advanced by these employees that

they were beneficiaries within the contemplation of Art. 5 of decedent's

will and entitled to a legacy to the extent indicated in said Article,

one of the objections interposed by the executor of said decedent's

estate was that the employees involved therein were not servants in the

personal employment of Richard T. Crane, Jr. As heretofore shown, that

is the executor's principal contention in the instant case. In the

Petre case, supra, in holding that the petitioners there were servants

in the personal employment of Mr. Crane and as such were entitled under

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4-5-8:

"Upon oral argument counsel for executor argued that the word 'servant' was confined to menials who had been in daily contact with Mr. Crane and served his personal wants; that words of general import must give way to words of special import; that 'person-' 'servants', and means personal servants and not all people

who work on his estate. Obviously this was not the construction placed upon art. 5 of the will by the executors themselves, because they have paid in legacies under art. 5 of the will to beneficiaries substantially \$487,000, and the legatees to whom these payments were made included not only household servants, such as maids, laundresses, chauffeurs, cooks, porters and housemen, but also outdoor servants who worked on the estate of Ipswich where petitioners were employed, including carpenters, laborers, poultrymen, teamsters, gatenmen and others. Forty of the servants included in that category were outside workers on the Ipswich estate at the time of Mr. Crane's death, and they ranged from superintendent down to common laborer. Their work was of the same general character as that of petitioners, and in paying their legacies the executors have evidently recognized the meaning of the word 'servant' as petitioners seek to have it construed.

"Counsel on both sides cite numerous authorities dealing with the construction of the word 'servant' and the interpretation that courts have placed upon wills making similar bequests, but as we view the controversy the question whether the particular language of art. 5 was intended to include petitioners along with other servants depends entirely upon the circumstances of the case.

"Counsel for executors invoke the familiar and well recognized rule that the intention of the testator must be ascertained from the whole will, and that no words used should be cast aside as meaningless. These propositions are well established and counsel for petitioners take no exception to the general principles of law established by the authorities cited in the executors' brief. Invoking these rules, we find that it was apparently Mr. Crane's desire to provide for all those who had been associated with him, not only in his business but also those who had contributed to his personal wants and comforts.

"Mr. Crane bequeathed to every employee of the Crane Company, who had been in continuous service for 10 full years 10 shares of Crane Company stock and one share, ^{employed} for each additional full year if such employee had been continuously up to and including 25 full years, and 2 shares of stock for each additional year in excess of 25 years. He also bequeathed 5,000 shares of Crane Company stock to be used as a pension fund for his employees, and gave each director of the company 1,000 shares of Crane Company stock. These bequests, taken together with the fifth clause of his will, indicate that it was his desire to provide for those who had served faithfully in his business enterprise, as well as his servants. There is no fair basis for excluding petitioners, whom we believe to have been servants in his personal employment, engaged in the same general class of work as many other employees to whom bequests have already been paid.

"Judge Trude of the circuit court in announcing his decision commented specifically on the case of In re Cassel (1922) 39 Times Law Reports 75, wherein the testator was a man of great wealth and had many establishments. His will made provision for 'every other clerk or servant who shall be in my employ at the time of my death.' The question arose as to whether four persons, one of whom was manager of testator's farms, at a yearly salary of 370 pounds plus a profit sharing arrangement, another who was estate agent on one of testator's estates, at a yearly salary of 240 pounds, another who was manager of his racing stables, at a yearly salary of 1,000 pounds, and one who was trainer of his race horses, at a yearly salary of 1,000 pounds, were comprised within the term 'servant,' and the court said (39 Times Law Reports 76): 'The testator desired to benefit all persons who had ministered to his service, and in the case of a man of the extraordinary wealth of the testator many persons might be in the position of servants whose social position was entirely different from that of

petitioners seek to have it construed. Executors have evidently recognized the meaning of the word 'servant' as character as that of petitioners, and in paying their legacies the executor has included in that category were outside workers on the Ipswich estate at the time of Mr. Crane's death, and they ranged from superintendents, laborers, bootmakers, teamsters, stevedores and others. Part of the estate of Ipswich where petitioners were employed, including carpenters, cooks, porters and housemen, but also outdoor servants who worked on the estate of Ipswich, such as maids, landstewards, chauffeurs, and others. \$487,000, and the legacies to whom these payments were made included paid in legacies under art. 5 of the will to beneficiaries substantially upon art. 5 of the will by the executor themselves, because they have who work on his estate. Obviously this was not the construction placed

legends entirely upon the circumstances of the case. art. 5 was intended to include petitioners along with other servants of the estate. With the construction of the word 'servant' and the interpretation that courts have placed upon wills making similar bequests, but as we view the controversy the question whether the particular language of art. 5 was intended to include petitioners along with other servants of the estate entirely upon the circumstances of the case.

"Council for Executors favors the latter and will recognize this that the intention of the testator must be ascertained from the whole will, and that no words used should be read aside as meaningless. These propositions are well established and counsel for petitioners take no exception to the general principle of law established by the authorities cited in the executor's brief. Involving these issues, so that it was apparently Mr. Crane's desire to provide for all those who had been associated with him, not only in his business but also those who had contributed to his personal wants and comforts.

"Mr. Crane bequeathed to every employee of the Crane Company, who had been in continuous service for 10 full years 10 shares of Crane Company stock and one share for each additional full year if such employee had been continuously employed up to and including 25 full years, and 2 shares of stock for each additional year in excess of 25 years. He also bequeathed 5,000 shares of Crane Company stock to be used as a pension fund for his employees, and gave each director of the company 1,000 shares of Crane Company stock. These bequests, taken together with the fifth clause of his will, indicate that it was his desire to provide for those who had served faithfully in his business enterprise, as well as his servants. There is no fair basis for excluding petitioners, whom we believe to have been servants in his personal employment, engaged in the same general class of work as many other employees to whom bequests have already been paid.

"Judge Trumbo of the circuit court in announcing his decision commented specifically on the case of In re Gassell (1922) 59 Times Law Reports 75, wherein the testator was a man of great wealth and had many establishments. His will made provision for 'every other clerk or servant who shall be in my employ at the time of my death.' The question arose as to whether four persons, one of whom was manager of testator's livery, at a yearly salary of 370 pounds plus a gratuity share in arrangement, another who was estate agent on one of testator's estates, at a yearly salary of 240 pounds, another who was manager of his racing stables, at a yearly salary of 1,000 pounds, and one who was trainer of his race horses, at a yearly salary of 1,000 pounds, were included within the term 'servant,' and the court said (9 Times Law Reports 76): 'The testator desired to benefit all persons who had ministered to his service, and in the case of a man of the extraordinary wealth of the testator many persons might be in the position of servants whose social position was entirely different from that of

those usually ranking in the servant class. So, for example, the captain of a private steam yacht might, although a highly trained navigator, be for the purpose of such a bequest as this a servant. In his (his Lordship's) judgment, all four persons came within the designation "servants" as used in the testator's will."

The executors' reply brief was filed shortly after our decision was rendered in the Petre case and they point to the language used in our opinion filed in that case "that it was apparently Mr. Crane's desire to provide for all those who had been associated with him, not only in his business but also those who had contributed to his personal wants and comforts" as supporting their contention in the case at bar that only those servants who had contributed directly to decedent's personal wants and comforts were intended beneficiaries under Art. 5 of his will. It should be noted that the executors strenuously protested in the Petre case that the employees who were petitioners there did not contribute to the personal wants and comforts of the decedent and therefore should not have been permitted to share as beneficiaries under the aforesaid Art. 5. The decision in the Petre case was adverse to the executors and while the language last above quoted did appear in our opinion filed in that cause, it was not controlling of the issues involved but merely presented an additional reason why the petitioning employees there qualified as servants entitled to receive a legacy under the provisions of decedent's will in controversy. That decedent manifested great pride in the ownership of "Jerseyhurst" is indicated by his letter in evidence to his nephews, in which he said: "Jerseyhurst has been in the family so long and has meant so much in the lives of all of us that I am anxious to perpetuate it as long as we can within reason. When you think of the two or three generations that have received so much benefit from it I look on it as somewhat of a responsibility on you to conduct it well and in a proper manner." That decedent considered petitioner a servant in his personal employment is indicated by the letter of his secretary of January 2, 1926, wherein it is said concerning Mr. Crane's gift of stock in 1926 to petitioner and other personal employees "that Mr. Crane directed that they should be included because of their personal service for the family." In determining the principal issue presented in the Petre case,

those usually ranking in the court of law. For example, the owner of a private steam yacht might, although a highly trained navigator, be for the purpose of such a vessel a servant. In his judgment, all four persons come within the definition of "servants" as used in the testator's will.

The executor's reply brief was filed shortly after our decision was rendered in the Fette case and they point to the language used in our opinion filed in that case "that it was apparently Mr. Crane's desire to provide for all those who had been associated with him, not only in his business but also those who had contributed to his personal wants and comforts" as supporting their contention in the case that only those servants who had contributed directly to decedent's personal wants and comforts were intended beneficiaries under Art. 5 of his will. It should be noted that the executor strenuously protested in the Fette case that the employees who were petitioners there did not contribute to the personal wants and comforts of the decedent and therefore should not have been permitted to share as beneficiaries under the will. The decision in the Fette case was adverse to the executor and while the language last above quoted did appear in our opinion filed in that case, it was not controlling of the issues involved but merely presented an additional reason why the petitioning employees there qualified as servants entitled to receive a legacy under the provisions of decedent's will in controversy. That decedent manifested great pride in his ownership of "Jeterhyrst" is indicated by his letter in evidence to his nephews, in which he said: "Jeterhyrst has been in the family so long and has meant so much in the lives of all of us that I am anxious to perpetuate it as long as we can within reason. When you think of the two or three generations that have received so much benefit from it I look on it as somewhat of a responsibility on you to conduct it well and in a proper manner." That decedent considered petitioner a servant in his personal employment is indicated by the letter of his secretary of January 2, 1928, wherein it is said concerning Mr. Crane's gift of stock in 1926 to petitioner and other personal employees "that Mr. Crane directed that they should be included because of their personal service for the family." In determining the principal issue presented in the Fette case,

we held that "there is no fair basis for excluding petitioners, whom we believe to have been servants in his personal employment."

It is conceded that petitioner herein, who was employed as a gardener, was a "servant" of decedent. That he was in the latter's "personal employment" must also be conceded. His wages were paid by decedent during the period for which his claim was allowed. Decedent carried workmen's compensation and liability insurance covering petitioner along with the other employees on the "Jerseyhurst" estate and he also paid the premium for such insurance. In our opinion the words "personal employment" were used by decedent merely to distinguish his personal employees from the Crane Company employees. Decedent himself, as well as his private secretary, Prentice, clearly recognized petitioner as one of his personal employees when he bestowed a gift of Crane Company stock upon him as such in 1926. The language used by the decedent in Art. 5 of his will "to each servant in my personal employment at the time of my death" is plain, ordinary, understandable English. We fail to perceive wherein it is in any wise ambiguous or open to interpretation. We are impelled to hold that petitioner was a servant in the personal employment of decedent and as such entitled to the legacy provided in Art. 5 of decedent's will.

The executors next claim that petitioner was not in decedent's employ at the time of the latter's death because he was not actually rendering service to him on the day Mr. Crane died. In our opinion there is no merit in this contention. When the decedent died Hansen had been continuously employed on the "Jerseyhurst" estate for twenty-six years, first by decedent's father and then successively by his mother, by him and his brother and finally by the testator. His employment by the testator exclusively commenced January 1, 1924. From 1905 to and including 1930, petitioner was employed on the "Jerseyhurst" estate. During each of those years he was notified by the superintendent of said estate to report for work by about March 15, and to perform his usual duties until the latter part of December, and in ad-

we held that "there is no fair case for excluding petitioners, whom we believe to have been servants in his personal employment."

It is conceded that petitioner Hansen, who was employed as a gardener, was a "servant" of decedent. That he was in the latter's "personal employment" must also be conceded. His wages were paid by decedent during the period for which his claim was allowed. Decedent carried workmen's compensation and liability insurance covering petitioner along with the other employees on the "Jensen-Hurst" estate and he also paid the premium for such insurance. In our opinion the words "personal employment" were used by decedent merely to distinguish his personal employees from the Crane Company employees. Decedent himself, as well as his private secretary, practiced, or practiced, recognized petitioner as one of his personal employees when he bestowed a gift of Crane Company stock upon him as such in 1916. The language used by the decedent in Art. 5 of his will "to each servant in my personal employment at the time of my death" is plain, ordinary, understandable English. We fail to perceive wherein it is in any way ambiguous or open to interpretation. We are impelled to hold that petitioner was a servant in the personal employment of decedent and as such entitled to the legacy provided in Art. 5 of decedent's will.

The executor next claims that petitioner was not in decedent's employ at the time of the latter's death because he was not actually rendering service to him on the day Mr. Crane died. In our opinion there is no merit in this contention. When the decedent died Hansen had been continuously employed on the "Jensen-Hurst" estate for twenty-six years, first by decedent's father and then successively by his mother, by him and his brother and finally by the testator. His employment by the testator exclusively commenced January 1, 1914. From 1908 to and including 1909, petitioner was employed on the "Jensen-Hurst" estate. During each of those years he was notified by the independent of said estate to report for work by about March 15, and to perform his usual duties until the latter part of December, and in all

dition thereto he was employed cutting and harvesting ice, as a rule, for a few days in January and February of each year. However, in 1931, because of an economy program which had been put into effect on the estate, his services as a gardener were dispensed with on October 17, rather than in late December as had previously been the rule. That decedent, as well as his private secretary, recognized and characterized petitioner's employment as continuous is demonstrated by Mr. Crane's gift of Crane Company stock to him in 1926 because of his twenty-one years "continuous service" up to that time. That Hansen was considered and treated as being a regular and continuous employee of decedent is also indicated by the fact that he was called upon to cut ice on the estate in the winter months of 1932 and to resume his duties as gardener in March, 1932. We are of the opinion that petitioner was a "regular" employee in the continuous employment of decedent despite the fact that he was not in any one year, except for the icing, on the payroll during the winter months. In not one of the twenty-six years that petitioner was employed by some member or members of the Crane family on the "Jerseyhurst" estate was he discharged from his position when his services as gardener were no longer required toward the end of each year. His services were simply dispensed with until there was need for them again in the spring. We think that the nature and character of Hansen's employment were such as to meet the requirement of Art. 5 that he was a servant in decedent's personal employment at the time of decedent's death.

In Cox v. Brown et al., 50 S. W. (2d) 763, the testator left \$5,000 to each servant in his employ for ten years on condition that such employment existed at the time of testator's death. Willie Cox had been for many years a laundress in the employ of testator, two, three or four days or more a week on a per diem basis, usually starting each Monday morning. She also worked elsewhere by the day occasionally and was paid for that work by others. After the testator's

dition thereto he was employed cutting and harvesting ice, as a rule, for a few days in January and February of each year. However, in 1931, because of an economy program which had been put into effect on the estate, his services as a gardener were discontinued with on October 1, rather than in late December as had previously been the rule. That defendant, as well as his private secretary, recognized and characterized petitioner's employment as continuous is demonstrated by Mr. Crane's gift of Crane Company stock to him in 1933 because of his twenty-one years "continuous service" up to that time. That Hansen was considered and treated as being a regular and continuous employee of defendant is also indicated by the fact that he was called upon to cut ice on the estate in the winter months of 1933 and to perform his duties as gardener in March, 1933. We are of the opinion that petitioner was a regular "employee" in the continuous employment of defendant despite the fact that he was not in any one year, except for the time, on the payroll during the winter months. In not one of the twenty-six years that petitioner was employed by some member or members of the Crane family on the "Larsenhurst" estate was he discharged from his position when his services as gardener were no longer required to tend the end of each year. His services were simply discontinued with until there was need for them again in the spring. We think that the nature and character of Hansen's employment were such as to meet the requirement of Art. 5 that he was a servant in defendant's personal employment at the time of defendant's death.

In Cox v. Worthington, 30 S. W. 2d (2d) 763, the testator left \$3,000 to each servant in his employ for ten years on condition that such employment existed at the time of testator's death. Willie Cox had been for many years a landman in the employ of testator, two, three or four days or more on a per diem basis, usually starting each Monday morning. She also worked elsewhere by the day occasionally and was paid for that work by others. After the testator's

death she continued to work for his widow. She worked for testator on the Monday and Tuesday of the week preceding his death. She remembered working on the Monday preceding testator's death on Saturday, but did not remember how many days she worked that week. The court in holding that she was entitled to the legacy of \$5,000 left by the testator "to each servant in his employ for ten years on condition that such employment existed at the decedent's death" said at p. 764:

"It can hardly be doubted that plaintiff was the servant of the testator, as that term is ordinarily understood and accented. We think, too, that she was continuously in his employ for the major portion of ten years next before his death, though not continuously in his service. Continuously in his employ does not mean continuously in service. To be employed in anything means not only the act of doing it, but also to be engaged to do it, or to be under contract or orders to do it. Hovey v. Grier, 324 Mo. 634, 23 S. W. (2d) 1058, 106. cit. 1055."

In Abbott v. Lewis, 77 N. H. 94, the will in question bequeathed to "Ada Rice, Mrs. Lewis' maid, if she shall be in the employ of Mrs. Lewis at the termination of this trust, one thousand dollars." Ada Rice was employed by Mrs. Lewis for many years as maid and nurse. She was not discharged from such employment but by reason of illness was unable to render further service and returned to her home in Nova Scotia. She never regained her health, but Mrs. Lewis frequently stated her desire that she return and sent her gifts of money and clothing. The court there said at p. 98:

"Ada Rice was not discharged from employment as Mrs. Lewis' maid. The evidence tends to prove merely a temporary absence on account of illness. Mrs. Lewis expected and desired the renewal of active service when renewed health permitted. The relations of confidence and friendship which would be implied from continued employment still existed; and as it was not understood that the employment was definitely terminated, upon the facts stated the maid is entitled to the legacy."

(See also Anderson v. Stone, 183 N. E. 841; In re Thompson's Estate, 213 N. Y. S. 426; In re Mitchell's Estate, 188 N. Y. S. 66.)

In Industrial Trust Co. v. Alves, 46 R. I. 16, the testator bequeathed \$1,000 to each servant "in my employ at the time of my death, who has been so employed for at least six months." The testator died in August, 1921. He had conducted a farm, upon which

the claimant had worked regularly during May, June and July and part time during February, March and April preceding the death of said testator. He received no pay for days on which he did not work. Passing upon the status of claimant in that case, the court said at p. 21:

"Usually during the months of February and March there are very many days when the weather is unsuitable for outdoor labor on a farm. * * * The testimony fairly shows that Sotel was regularly employed by the testator for some years immediately preceding his death. It does not appear that Sotel was ever discharged and if he did lose as much time during February and March, 1921, as the executor contends, he did not thereby lose his status as one regularly employed. He was at all times subject to the call of the testator. See Abbott v. Lewis, 77 N. H. 94; Re Mitchell's Estate, 186 N. Y. Supp 666."

Such other points as ~~xx~~ have been urged have been considered, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons stated herein the judgment of the Circuit court of Cook county should be and is affirmed.

AFFIRMED.

Burke, P. J., and Frie , J., concur.

the claimant had worked regularly during May, June and July and part time during February, March and April preceding the death of said testator. He received no pay for days on which he did not work.

21:

"Usually during the months of February and March there are very many days when the weather is unsuitable for outdoor labor on a farm. * * * The testimony fairly shows that hotel was regularly employed by the testator for some years immediately preceding his death. It does not appear that hotel was ever discharged and it is as much time during February and March, 1931, as the executor contends, he did not thereby lose his status as one regularly employed. He was at all times subject to the call of the testator. See *Scott v. Lewis*, 77 N. H. 24; *McIntosh's Estate*, 103 N. H. 200.

Such other points as may have been raised have been considered, but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons stated herein the judgment of the Circuit court of Cook County should be and is affirmed.

APPROVED,

Burns, P. J., and Trustees, concur.

"Adm. of the will of the late Mrs. Mary Ann Lewis, deceased, in the County of Cook, State of Illinois."

In v. Lewis

Testamentary, in which the said Mary Ann Lewis, deceased, was the testator, and the said Lewis, the executor, was the defendant.

9355

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in
the year of our Lord one thousand nine hundred and thirty-eight,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

298 I.A. 628'

BE IT REMEMBERED, that afterwards, to-wit: On JAN 26 1939
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1938.

Thomas Herbert,

Appellee

vs.

Elgin, Joliet & Eastern
Railway Company, a Corporation,

Appellant

Appeal from Circuit Court
Will County.

HUFFMAN - J.

This is a suit by appellee against appellant to recover for personal injuries sustained as the result of a collision between an automobile which he was driving, and a tank car which was attached to one of appellant's engines. Trial resulted in a verdict in favor of appellee for \$3000. This appeal is prosecuted from judgment entered upon the verdict.

The accident occurred at a place on state highway No. 69 where the same crosses appellant's tracks, and at a point about five miles west of the city of Joliet. The highway was an ordinary two lane concrete highway, with the usual black line down the center. It ran east and west. The crossing was in the country and appellant had but one set of tracks, which intersected the highway at right angles. A freight train of appellant company was proceeding north toward the intersection of this highway. At a point about one hundred fifty feet south of the crossing, the engineer brought the train to a stop. The engine and tender were cut loose from the rest of the train and the engine was moved forward across the intersection of route 69, to a place about five hundred feet north of the crossing, where an empty tank car was picked up from a spur or switch track. After this, the engine proceeded back upon the main track and started backing south toward the crossing and toward the train which was

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1934.

Thomas Herbert,

Appellee

vs.

Will County.

Wiggin, Joliet & Eastern
Railway Company, a Corporation,

Appellant

HUTCHMAN - 1.

This is a writ by appellee against appellant to recover for personal injuries sustained as the result of a collision between an automobile which he was driving, and a train on which was attached to one of appellant's engines. Trial resulted in a verdict in favor of appellee for \$500. The appeal is prosecuted from judgment entered upon the verdict.

The accident occurred at a place on State Highway No. 66

where the same crosses appellant's tracks, and at a point about five miles west of the city of Joliet. The highway was an ordinary two lane concrete highway, with the usual black line down the center. It ran east and west. The crossing was in the country and appellant had but one set of tracks, which intersected the highway at right angles. A freight train of appellant company was proceeding north toward the intersection of the highway. At a point about one hundred fifty feet south of the crossing, the engineer brought the train to a stop. The engine and tender were cut loose from the rest of the train and the engine was moved forward across the intersection of route 66, to a place about five hundred feet north of the crossing, where an empty tank car was placed in line a spur or switch track. After this, the engine proceeded back upon the main track and started backing south toward the crossing and toward the train which was

standing upon the south side of the crossing. The tank car was on the south end of the tender, in a position to be coupled to the rest of the train. As the tank car came across the said highway, appellant, who was operating the automobile east thereon, collided with the set of trucks under the tank car, which were nearest the engines.

It appears that as appellee's automobile approached the place of contact with the tank car, it left the south traffic lane and skidded across to the north side of the highway. The collision caused appellee's automobile to rebound and turn around in the road, facing the direction from which it had been approaching. Appellee sustained an injury to his left arm, which he claims has impaired the use of his elbow. In addition to this, he sustained other bruises and lacerations. He states that the weather was nice and clear, the pavement dry, the sun shining, and that as he approached the crossing he observed the train of cars on the south side of the crossing and the engine and oil tank car on the north side of the crossing. He further states that when he saw the engine and tank car, they were standing still, with the south end of the tank car about thirty feet north of the concrete slab. He denies that the whistle was blown or the bell rung, or that a trainman or flagman was on the tank car, or that any signal was given to advise him or warn him that the engine was about to back across the highway. He denies that he was driving at an excessive rate of speed. He claims that as he approached the crossing, he was running about thirty-five miles an hour, and that at the time he collided with the tank car, he was going about ten or fifteen miles an hour. He first noticed the engine and tank car when he was twenty rods from the crossing, which would be a distance of about three hundred and forty feet. He first saw the train of cars standing on the south side of the crossing when he was three or four hundred feet west. He claims that he was within sixty feet of the crossing, traveling thirty-five miles an hour, when the engine started to back.

standing upon the south side of the crossing. The tank car was on the south end of the tender, in a position to be coupled to the west of the train. As the tank car came across the highway, appellant, who was operating the automobile east thereon, collided with the set of trucks under the tank car, which are nearest the engine.

It appears that as appellee's automobile approached the face of contact with the tank car, it left the south traffic lane and skidded across to the north side of the highway. The collision caused appellee's automobile to rebound and turn around in the road, facing the direction from which it had been approaching. Appellee sustained an injury to his left arm, which he claims has impaired the use of his elbow. In addition to this, he sustained other bruises and lacerations. He states that the weather was nice and clear, the pavement dry, the sun shining, and that as he approached the crossing he observed the train of cars on the south side of the crossing and the engine and oil tank car on the north side of the crossing. He further states that when he saw the engine and tank car, they were standing still, with the south end of the tank car about thirty feet north of the concrete slab. He denies that the whistle was blown or the bell rung, or that a trainman or flagman was on the tank car, or that any signal was given to advise him or warn him that the engine was about to back across the highway. He denies that he was driving at an excessive rate of speed. He claims that as he approached the crossing, he was running about thirty-five miles an hour, and that at the time he collided with the tank car, he was going about ten or fifteen miles an hour. He first noticed the engine and tank car when he was twenty rods from the crossing, which would be a distance of about three hundred and forty feet. He first saw the train of cars standing on the south side of the crossing when he was three or four hundred feet west. He states that he was within sixty feet of the crossing, traveling thirty-five miles an hour, when the engine started to back.

The owner of the automobile being operated by appellee, was in the car at the time of the accident. He states that when they were within twenty feet of the crossing, they were going from forty to forty-five miles per hour; that the engine had been standing still, and that it then started backing toward the crossing. He denies that any signal was given by whistle or bell, or that any trainman or flagman was on the tank car. He states that he saw the train of cars standing on the south side of the crossing and the engine on the north side of the crossing. His testimony is substantially the same as that of appellee.

The police officer who arrived at the scene of the accident shortly after it occurred, states that both appellee and the owner of the automobile were sitting in the car when he arrived; that it was about fifteen or twenty feet west of the railroad crossing and headed west, which was the direction from which it had been approaching the tracks.

The engineer of the train testified that he had been in the employ of appellant company for thirty-two years; that he stopped the train in question about one hundred fifty feet south of the crossing; that the engine and tender were cut loose from the rest of the train and proceeded to a switch track some three or four hundred feet north of the crossing; that there he picked up an empty tank car, and after he had come back upon the main track from the switch, that he started backing south on the main track toward the train of cars which was standing south of the crossing. He states that as the engine was disconnected from the train in the first instance, the bell was started ringing by the automatic ringing device, that this device was left on during the entire time, and that the bell had been ringing continuously from the time the engine was disconnected from the train south of the crossing until the accident happened. He states that the bell ringing device operates by air pressure, and that after it is turned on, it continues to operate until it is turned off.

The owner of the automobile being operated by the witness, was in the car at the time of the accident. He states that when they were within twenty feet of the crossing, they were going from forty to forty-five miles per hour; that the engine had been standing still, and that it then started backing toward the crossing. He denies that any signal was given by whistle or bell, or that any fireman or flagman was on the tank car. He states that he saw the train of cars standing on the south side of the crossing and the engine on the north side of the crossing. His testimony is substantially the same as that of the witness.

The police officer who arrived at the scene of the accident shortly after it occurred, states that both the witness and the owner of the automobile were sitting in the car when he arrived; that it was about fifteen or twenty feet west of the railroad crossing and headed west, which was the direction from which it had been approaching the track.

The engineer of the train testified that he had been in the employ of appellant company for thirty-two years; that he stopped the train in question about one hundred fifty feet south of the crossing; that the engine and tender were cut loose from the rest of the train and proceeded to a switch track some three or four hundred feet north of the crossing; that when he looked up an empty tank car, and after he had come back upon the main track from the switch, that he started backing south on the main track toward the train of cars which was standing south of the crossing. He states that as the engine was disconnected from the train in the first instance, the bell was started ringing by the automatic ringing device, that this device was left on during the entire time, and that the bell had been ringing continuously from the time the engine was disconnected from the train south of the crossing until the accident happened. He states that the bell ringing device operated by air pressure, and that after it is turned on, it continues to operate until it is turned off.

In addition to the engineer and fireman who were in the cab of the engine, there was also a brakeman, Charles Sexton, who disconnected the train from the engine south of the highway. He states he rode on the rear footboard of the engine while it proceeded north to the switch track, and on the tank car while the engine was proceeding south toward the rest of the train.

The engineer states that as he was backing the engine and tank car south across the highway, at a speed of about five miles an hour, the fireman who was on the west side of the cab suddenly called to him "that will do," which means to stop immediately. The engineer says he stopped immediately, and as he did so he heard the crash of the automobile as it struck the tank car. He got down from the engine and found the automobile facing west on the north side of the concrete and about fifteen to twenty-five feet west of the railroad crossing. He examined the point where the automobile had collided with the tank car. He states there were skid marks left by rubber tires on the concrete highway for a distance of more than a hundred feet, which skid marks led to the point of collision and there ended. He also found the marks on the trucks under the north end of the tank car, caused by the collision. The train crew consisted of the engineer, fireman, two switchmen, and a conductor. The engineer, fireman and one switchman were with the engine, while the conductor and other switchman were at the rear of the train. The engineer also states that the whistle was blown from the time he started backing the train on the main track after leaving the switch track, and that it was blown continuously by a series of blasts, from this time until the accident.

The fireman Woock states that he had been employed by appellant company for thirty-two years; that he was the fireman on the engine involved in this accident; that the engine was cut loose from the train below the highway crossing, from where it proceeded north to the switch track and picked up an empty tank car; that after the engine and tank car came from the switch track upon the main, and started south toward the highway crossing, that he was sitting in the cab and on the west side thereof, which was the direction from

In addition to the engineer and fireman who were in the cab of the engine, there was also a fireman, Charles Sexton, who dismounted from the engine south of the highway. He stated that he rode on the rear footboard of the engine while it proceeded north to the switch track, and on the tank car while the engine was proceeding south toward the rest of the train.

The engineer states that as he was backing the engine and tank car south across the highway, at a speed of about five miles an hour, the fireman who was on the west side of the car suddenly called to him "Look out," which means to stop immediately. The engineer says he stopped immediately, and as he did so he heard the crash of the automobile as it struck the tank car. He got down from the engine and found the automobile lying west on the north side of the concrete and about fifteen to twenty-five feet west of the railroad crossing. He examined the point where the automobile had collided with the tank car. He states there were skid marks left by rubber tires on the concrete highway for a distance of some ten or twelve feet, which skid marks led to the point of collision and there ended. He also found the marks on the trucks under the north end of the tank car, caused by the collision. The train crew consisted of the engineer, fireman, two switchmen, and a conductor. The engineer, fireman and one switchman were with the engine, while the conductor and other switchman were at the rear of the train.

The engineer also states that the whistle was blown from the time he started backing the train on the main track after leaving the switch track, and that it was blown continuously by a series of blasts, from the time until the accident.

The fireman also stated that he had been employed by appellant company for thirty-two years; that he was the fireman on the engine involved in this accident; that the engine was cut loose from the train below the highway crossing, from where it proceeded north to the switch track and struck an empty tank car; that after the engine and tank car came from the switch track upon the main, and started south toward the highway crossing, that he was sitting in the cab and on the west side thereof, which was the direction from

whence appellant was approaching. He estimates the speed of the engine to have been about five miles an hour. He states that the bell was ringing continuously from the time the engine was cut off from the rest of the train, until the time of the accident. He further states that the engineer had been blowing the whistle as he approached the crossing, and that he still had his hand on the whistle cord when the automobile collided with the tank car, having just then finished causing a blast of the whistle. The fireman states that he was looking south along the track toward the standing train, but as the engine approached the crossing he looked west and saw the automobile in question. At the time he saw the automobile, it had commenced to cross the center line of the pavement from the south side toward the north side. He estimates the speed of the automobile to have been fifty-five miles an hour. He called to the engineer, "that will do," and states that the engineer stopped the engine. He watched the automobile from that point to the point of collision with the north trucks under the tank car. At that time the tank car was completely across the highway and the north trucks thereof were about even with the north edge of the concrete slab. He states that after the automobile came into contact with the tank car, it swerved around to the south and headed west, in the direction from which it had been approaching.

Charles Sexton was the switchman with the engine. He states that he cut the engine loose from the train south of the crossing, and rode on the rear of the engine to the switch track north of the crossing; that after the empty tank car had been picked up, he rode on the east side and toward the rear end of the tank car. He says that after leaving the switch track, the speed of the engine was about five miles an hour as it approached the crossing; that the bell was ringing continuously and that the engineer had been sounding the whistle by a series of signals consisting of two long blasts and a short. He states he saw the automobile as it approached the crossing when about six hundred feet west; that he judged it to be traveling from fifty to fifty-five miles an hour; that as the tank car

whereas speedometer was 20 m.p.h. He estimated a speed of 20 m.p.h. engine to have been about five miles an hour. He states that the bell was ringing continuously from the time the engine was cut off from the rest of the train, until the time of the accident. He further states that the engineer had been blowing the whistle as he approached the crossing, and that he still had his hand on the whistle cord when the automobile collided with the tank car, moving just then finished causing a blast of the whistle. The witness states that he was looking south along the track toward the standing train, but as the engine approached the crossing he looked west and saw the automobile in question. At the time he saw the automobile, it had commenced to cross the center line of the pavement from the south side toward the north side. He estimated the speed of the automobile to have been fifty-five miles an hour. He called to the engineer, "that will do," and states that the engineer stopped the engine. He watched the automobile from that point to the point of collision with the north trucks under the tank car. At that time the tank car was completely across the highway and the north trucks thereof were about even with the north edge of the concrete slab. He states that after the automobile came into contact with the tank car, it swerved around to the south and headed west, in the direction from which it had been approaching.

Charles Sexton was the witness with the engine. He states that he cut the engine loose from the train south of the crossing, and rode on the rear of the engine to the switch track north of the crossing; that after the empty tank car had been picked up, he rode on the east side and toward the rear end of the tank car. He says that after leaving the switch track, the speed of the engine was about five miles an hour as it approached the crossing; that the bell was ringing continuously and that the engineer had been sounding the whistle by a series of blasts consisting of two long blasts and a short. He states he saw the automobile as it approached the crossing when about six hundred feet west; that he judged it to be traveling from fifty to fifty-five miles an hour; that as the tank car

approached the highway crossing, his view of the automobile was obstructed by the body of the tank car, which extends beyond the trucks. He says the last view he had of the automobile, was when it was from three to four hundred feet west of the crossing. He says that between this time and the time it struck the tank car, he heard brakes squeaking. He states that the south end of the tank car was about thirty feet north of the concrete and in motion when he last saw the automobile some three or four hundred feet away. This witness had been a switchman for twenty-two years. He states that the trucks of the tank car are set in about five feet from the end.

Charles E. Paulsen, who was then in the employ of the Chicago District Pipe Line Company, at Joliet, states that he was acquainted with the crossing in question; that he remembers the accident in question; that immediately prior thereto he was driving his car north toward the highway upon which appellant was travelling; that he was coming from his place of employment; that as he drove north toward the highway, he saw the train of cars standing on the tracks south of this crossing; that as he approached the crossing he saw an automobile about six hundred feet west on the state highway; that in his opinion it was travelling at a speed of from forty to fifty miles an hour; that he saw the engine and tank car approaching the crossing from the north; that it was then about seventy-five feet north of the crossing; that the engine and tank car were in motion and going about as fast as a man would walk. He states that he saw someone on the tank car at the south end thereof; that when he approached a point about even with the north end of the train of cars which were standing south of the highway, he brought his car to a stop; that he looked west to observe the approaching automobile before driving his car out upon the concrete highway. He drove his car upon the highway in question and turned the same to the right. The road upon which he had been proceeding north to this point, was upon the east side of the tracks. At the time he drove upon the state highway and turned east, he states that the

approached the highway crossing, his view of the automobile was obstructed by the body of the tank car, which extends beyond the truck. He says the last view he had of the automobile, was when it was from three to four hundred feet east of the crossing. He says that between this time and the time it struck the tank car, he heard brakes squeaking. He states that the south end of the tank car was about thirty feet north of the concrete and in motion when he last saw the automobile some three or four hundred feet away. This witness had been a witness for twenty-two years. He states that the truck of the tank car was east in about five feet from the end.

Charles E. Hansen, who was then in the employ of the Chicago District Pipe Line Company, at Joliet, states that he was acquainted with the crossing in question; that he remembers the accident in question; that immediately prior thereto he was driving his car north toward the highway upon which applicant was traveling; that he was coming from his place of employment; that as he drove north toward the highway, he saw the train of cars standing on the tracks south of this crossing; that as he approached the crossing he saw an automobile about six hundred feet west in the state highway; that in his opinion it was traveling at a speed of from forty to fifty miles an hour; that he saw the car and tank car approaching the crossing from the north; that it was then about seventy-five feet north of the crossing; that the engine and tank car were in motion and going about as fast as a man would walk. He states that he saw someone on the tank car at the north end thereof; that when he approached a point about even with the north end of the train of cars which were standing south of the highway, he brought his car to a stop; that he looked west to observe the approaching automobile before driving his car out upon the concrete highway. He drove his car upon the highway in question and turned the same to the right. The road upon which he had been proceeding north to this point, was upon the east side of the tracks. At the time he drove upon the state highway and turned east, he states that the

automobile approaching the railroad crossing from the west, was about two hundred feet from the crossing, and that the south end of the tank car had then entered the highway and was about half way across. This witness states that he continued driving east on the state highway, observing the situation behind him with relation to the approaching automobile and the tank car, by looking in his rear view mirror. In this manner he says he saw the collision, and that at the time of the collision, the tank car was then entirely across the highway; that it thereby blocked his vision of the approaching automobile, but that he did hear the crash as the automobile struck the tank car; that he thereupon drove his car off the road and went back to the scene of the accident. He states that the automobile which appellant was operating was turned around facing the direction from which it had been approaching, and standing on the pavement about twenty feet west of the crossing. He says the bell of the engine was ringing at this time, and that he heard it ringing when he approached the concrete highway from the south, and as he came to a stop.

The witness Manfred, testifies that he is employed by the Chicago District Pipe Line Company, that ^{his} ~~the~~ place of employment is south of the crossing in question, and where the witness Paulsen was employed. He states that at the time in question he was leaving his place of employment and driving north in his car toward this same crossing, and on the same road Paulsen was travelling. He says that as he approached the concrete highway in question, he saw the standing train of freight cars to his left and south of the crossing; that as he passed the north end of the string of freight cars, he observed an automobile approaching the railroad crossing from the west; that it was then about six or seven hundred feet away; that he judged it to be running about forty-five miles an hour; that as he approached the concrete highway, he stopped his car and looked both east and west to see what traffic might be coming; that at this particular time the car approaching from the west was then about three hundred feet from the crossing. He states

automobile approaching the railroad crossing from the west, was about two hundred feet from the crossing, and the car was at the left of the track and had just entered the crossing and was about half way across. This witness states that he continued looking west

on the state highway, observing the situation around him with

relation to the approaching automobile and the tank car, by looking

in his rear view mirror. In this manner he says he saw the collision

and that at the time of the collision, the tank car was traveling

across the highway; that it thereby blocked his vision of the approaching

automobile, but that he did not see the crash as the automobile

struck the tank car; that he thereupon drove his car off the road

and went back to the scene of the accident. He states that the

automobile which appeared was operating and turned around facing

the direction from which it had been proceeding, and standing in

the pavement about twenty feet west of the crossing. He says

the bell of the engine was ringing at this time, and that he heard

it ringing when he approached the concrete highway from the east,

and as he came to a stop.

The witness further, testifies that he is employed by the

Chicago District Life Company, 125 West Lake Street, Chicago, Illinois

south of the crossing in question, and where the witness has been

was employed. He states that at the time in question he was leaving

his place of employment and driving north in his car toward this

same crossing, and on the same road he was traveling. He

says that as he approached the concrete highway in question, he

saw the standing train of freight cars to his left and south of

the crossing; that as he reached the north end of the bridge of

freight cars, he observed an automobile approaching the railroad

crossing from the west; that it was then about six or seven hundred

feet away; that he judged it to be running about forty-five miles

an hour; that as he approached the concrete highway, he stopped his

car and looked both east and west to see what traffic might be

coming; that at this particular time the car approaching from the

west was then about three hundred feet from the crossing. He states

that when he stopped his automobile for the concrete highway, he noticed the engine and tank car approaching the highway crossing from the north; that the same was in motion; that he did not drive his car any further at that time, but remained where he had stopped south of the concrete, until after the collision occurred. He says he saw a member of the train crew on the tank car. He says the engine bell was ringing. He further states that at the time of the collision the tank car was completely across the highway and that the automobile struck the tank car on the north end. He says the road on which his car was standing was lower than the concrete highway, and that this enabled him to see under the tank car and observe what was going on, and thus enabled him to have an unobstructed view of the accident. He says that prior to the accident, he heard the screeching of brakes coming from the automobile, and when this commenced the automobile was about one hundred feet west of the crossing. He states that when the witness Paulsen drove upon the concrete highway and started east, that he was about one hundred feet behind him. He says the thing that caused him to let his car remain standing, was the situation then before him, and that he remained there to see what was going to happen. He says his view was clear and that he saw the impact between the automobile and the tank car. ~~He says he passed this crossing every day and was familiar with it.~~ He states that after the brakes were applied to the car, it skidded at a northeast angle across the highway and was on the north side of the concrete when it collided with the tank car. He says he passed this crossing every day and was familiar with it. He estimates the speed of the automobile had been reduced to about twenty-five miles an hour at the time it collided with the tank car.

Appellee ~~in~~ states that the weather was clear, the pavement dry, and his view unobstructed; that he saw the string of freight cars standing south of the crossing, and that he saw the engine and tank car just north of the crossing. He claims the engine and tank car were standing still, with the south end of the tank car about thirty feet north of the pavement, and that as he came to

that when he stopped in automobile for the concrete highway, he noticed the engine and tank car approaching the highway crossing from the north; that the same was in motion; that he did not drive his car any further at that time, but remained where he had stopped south of the concrete, until after the collision occurred. He says he saw a member of the train crew on the tank car. He says the engine bell was ringing. He further states that at the time of the collision the tank car was completely across the highway and that the automobile struck the tank car on the north end. He says the road on which his car was standing was lower than the concrete highway, and that this enabled him to see under the tank car and observe what was going on, and thus enabled him to have an unobstructed view of the accident. He says that prior to the accident, he heard the screeching of brakes coming from the automobile, and when this commenced the automobile was about one hundred feet west of the crossing. He states that when the witness Paulsen drove upon the concrete highway and started east, that he was about one hundred feet behind him. He says the thing that caused him to let his car remain standing, was the situation then before him, and that he remained there to see what was going to happen. He says his view was clear and that he saw the impact between the automobile and the tank car. He states that after the brakes were applied to the car, it skidded at a northeast angle across the highway and was on the north side of the concrete when it collided with the tank car. He says he passed this crossing every day and was familiar with it. He estimates the speed of the automobile had been reduced to about twenty-five miles an hour at the time it collided with the tank car.

Appellee in states that the weather was clear, the pavement dry, and his view unobstructed; that he saw the skidding of the engine cars standing south of the crossing, and that he saw the engine and tank car just north of the crossing. He claims the engine and tank car were standing still, with the south end of the tank car about thirty feet north of the pavement, and that as he came to

the crossing, the engine suddenly started to back south at a rapid rate of speed, about twenty-five miles per hour, thus placing the tank car upon the highway at a time and in a manner so that he was unable to avoid the accident. He further claims that no signal either by bell or whistle was given and that no trainman was upon the tank car. These contentions are against the manifest weight of the evidence. Appellee was aware of the situation. A person approaching a known place of danger is chargeable with the exercise of care and caution commensurate with the known danger.

We find the verdict is against the manifest weight of the evidence and the judgment herein is reversed and the cause remanded.

Reversed and remanded.

the crossing, the engine suddenly started to back again at a rapid rate of speed, about twenty-five miles per hour, thus placing the tank car upon the highway at a time and in a manner so that it was unable to avoid the accident. He further states that no signal either by bell or whistle was given and that no warning was given the tank car. These contentions are against the manifest weight of the evidence. Appellee was aware of the situation. A person approaching a known place of danger is charged with the exercise of care and caution commensurate with the known danger. We find the verdict is against the manifest weight of the evidence and the judgment herein is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

91556

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the 4th day of October, in
the year of our Lord one thousand nine hundred and thirty-eight,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

298 I.A. 628²

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS 60637
OFFICE OF THE DEAN OF STUDENTS

Dear Mr. [Name]:
I am writing to you regarding the [Name]
[Name] [Name] [Name]
[Name] [Name] [Name]
[Name] [Name] [Name]
[Name] [Name] [Name]

Sincerely,
[Name]
[Name]
[Name]

Very truly yours,
[Name]

[Name]
[Name]

[Name]
[Name]

[Name]

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1938.

Clarence Briggs, Administrator
of the Estate of Betty Irene
Briggs, deceased,

Appellee

Appeal from Circuit Court,
Knox County.

vs.

Golden Cream Dairy, Inc., a
Corporation, and M. M. Herndon,

Appellants.

HUFFMAN - J.

This is a suit brought by appellee as administrator of the estate of Betty Irene Briggs, against appellants for the wrongful death of said child. Appellant, The Golden Cream Dairy Company, among other things, was engaged in the business of delivering milk in the city of Galesburg. Its servant and agent, M. M. Herndon, also an appellant, was operating the particular delivery truck involved in this case. He was making delivery of milk to the homes of customers in said city along and near Morton Avenue, at the time of the accident in question. The milk truck was parked on Morton Avenue between the intersection of Yates and Fifer streets with said Morton Avenue. The accident occurred at about 7:20 o'clock on the morning of September 4, 1937. The home in which the deceased child lived was on the south-west corner of the intersection of Morton Avenue and Yates Street. Morton Avenue runs north and south and Yates Street east and west. Plaintiff's intestate was eight years old at the time. The morning in question was on Saturday. The residence just south of where the deceased lived, was occupied by the Heizer family. The milk truck drove up in front of the Heizer residence, where it was stopped by the driver for the purpose of his making a delivery of milk to that family. Betty Heizer, aged

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CHURCH, et al., Appellants,
vs.
GOLDEN GREEK DAIRY, INC., et al., Appellees.

Glenn Briggs, Plaintiff for
the Estate of Betty Irene
Briggs, deceased,

vs.
Golden Greek Dairy, Inc.,
Appellee.

Appellees

vs.

Golden Greek Dairy, Inc.,
Corporation, and M. E. Harrison,

Appellees.

LUTHERMAN - 1.

This is a suit brought by appellees for administration of the
estate of Betty Irene Briggs, and their appellees for the return of
death of said child. Appellant, The Golden Greek Dairy Company,
among other things, was engaged in the business of delivering milk
in the city of Chicago. Its servant and agent, E. A. Harrison,
also an appellee, was operating the partitioned delivery truck
involved in this case. He was making delivery of milk to the homes
of customers in said city along and near Morton Avenue, at the time
of the accident in question. The milk truck was parked on Morton
Avenue between the intersection of Yates and Fifty-fifth streets with
said Morton Avenue. The accident occurred at about 7:30 o'clock
on the morning of September 4, 1937. The one in which the deceased
child lived was on the south-west corner of the intersection of
Morton Avenue and Yates Street. Morton Avenue runs north and south
and Yates Street east and west. Plaintiff's intestate was eight
years old at the time. The morning in question was on Saturday.
The residence just south of where the deceased lived, was occupied
by the Helzer family. The milk truck drove up in front of the Helzer
residence, where it was stopped by the driver for the purpose of
his making a delivery of milk to that family. Betty Helzer, aged

nine, was in the front yard with her mother at the time. The Heizer child and the deceased were expecting to go to a grocery store on an errand for Mrs. Heizer. The Heizer child states that she saw the milk truck drive up and stop in front of her house and the driver start to bring the milk to the door. She had a small wagon for the purpose of bringing back from the grocery store the articles which she was to obtain for her mother. She states that she and the deceased had started to the store to get the groceries; that they were walking north on the west side of Morton Avenue and toward Yates Street; that the deceased was walking on the east side of this witness; that the witness was in the road; that no sidewalk was constructed along here; that the road was made of cinders, which was a good place to walk; that the driver after making delivery of the milk to the Heizer home, returned to his truck and started backing the same north toward the Briggs residence. The back corner of the milk truck struck the deceased, knocking her down, and it appears that the right rear wheel passed over her body. The child died from the injuries sustained. The father as administrator, instituted this suit to recover for the wrongful death of said child, alleging damages in the sum of \$10,000. The cause was heard by jury, which returned a verdict in the sum of \$7500. Appellants appeal from the judgment entered on the verdict.

On cross examination of the witness Betty Heizer, it appears that the deceased at the time of the accident and before the children had started their trip to the grocery store, was standing back of the truck for the purpose of securing the milk that was to be delivered at her residence, which was the next house north of the Heizer residence; that she had her back toward the truck; that the truck was headed south, but stopped on the west side of the street; and that while she was in this position, the driver of the truck started backing it north to a position opposite the Briggs residence. In the performance of this operation, the deceased child was struck by the back end of the truck.

nine, was in the front yard with her mother at the time. The Helzer child and the deceased were expecting to go to a grocery store on an errand for Mrs. Helzer. The Helzer child states that she saw the milk truck drive up and stop in front of her house and the driver start to bring the milk to the door. She had a small wagon for the purpose of bringing back from the grocery store the articles which she was to obtain for her mother. She states that she and the deceased had started to the store at the time the truck arrived; that they were walking north on the west side of Norton Avenue and toward Yates Street; that the deceased was walking on the east side of this street; that the witness was in the road; that no sidewalk was constructed along her; that the driver was made of orders, which was a good place to wait; that the driver after making delivery of the milk to the Helzer house, returned to his truck and started backing the same north toward the Helzer residence. The back corner of the milk truck struck the deceased, knocking her down, and it appears that the right rear wheel passed over her body. The child died from the injuries sustained. The father as administrator, instituted this suit to recover for the wrongful death of said child, alleging damages in the sum of \$10,000. The cause was heard by jury, which returned a verdict in the sum of \$7500. Appellate appeal from the judgment entered on the verdict. On cross examination of the witness Betty Helzer, it appears that the deceased at the time of the accident and before the children had started their trip to the grocery store, was standing back of the truck for the purpose of securing the milk that was to be delivered at her residence, which was the next house north of the Helzer residence; that she had her back toward the truck; that the truck was headed south, but stopped on the west side of the street; and that while she was in this position, the driver of the truck started backing it north to a position opposite the Helzer residence. In the performance of this operation, the deceased child was struck by the back end of the truck.

The witness Sargent was at the Heizer residence that morning at the time of the accident. He saw the truck as it was parked in front of the Heizer residence, but did not see the accident. The first notice that these parties had of the accident was when the Heizer child came running to the house exclaiming that, "Betty got run over." This witness went out immediately where he found the truck driver who requested that they call an ambulance. This was done and the child taken to the hospital. It is apparent that the right rear wheel must have passed over the body of the deceased.

Mrs. Heizer states that there are no walks at this place and when they walk they walk in the street, which was of cinders; that she told her daughter to hurry to the store; that her daughter wanted the deceased to go with her, to which the deceased stated that she would return to her home and ask her mother if she might go. It was then the children left the Heizer premises and went out upon the street. Mrs. Heizer did not see the accident. She states that the driver of the truck left the motor running while he came in to make delivery of the milk at her residence. It appears that the only person who saw the accident was the Heizer child who was in company with the deceased at the time.

The foregoing is substantially the evidence on the part of appellee. Appellant creamery company offered its driver, Herndon, (co-defendant), as a witness for the purpose of showing the position of the truck immediately after the death of plaintiff's intestate. Objection was made to this witness testifying, which objection was sustained, whereupon counsel for appellants made an offer of proof by said witness, which offer was made in the absence of the jury. This offer had to do with the position of the truck after the death of plaintiff's intestate, and the condition of the street at the place in question. The offer was objected to and the objections sustained, whereupon appellants rested.

The witness Garment as at the Heizer residence that morning at the time of the accident. "I saw the truck as it was parked in front of the Heizer residence, but did not see the accident. The first notice that these parties had of the accident was when the Heizer child came running to the house exclaiming that, "Daddy got run over." This witness went out immediately to see if there was a truck driver who requested that they call an ambulance. This was done and the child taken to the hospital. It is agreed that the right rear wheel must have passed over the body of the deceased. Mrs. Heizer stated that while she was no longer at this place when they walk in the street, which was of course, that she told her daughter to hurry to the store; that her daughter wanted the deceased to go to the store, to which the deceased stated that she would return to her home and ask her mother if she might go. It was then the children left the Heizer residence and went out upon the street. Mrs. Heizer did not see the accident. She states that the driver of the truck left the motor running while he came in to make delivery of the milk at her residence. It appears that the only person who saw the accident was the Heizer child who was in company with the deceased at the time. The foregoing is substantially the evidence on the part of the appellee. Appellant's counsel offered the driver, Vernon, (co-defendant), as a witness for the purpose of showing the position of the truck immediately after the death of Plaintiff's testator. Objection was made to this witness testifying, which objection was sustained, whereupon counsel for appellant made an offer of proof by said witness, which offer was made in the absence of the jury. This offer had to do with the position of the truck after the death of Plaintiff's testator, and the condition of the street at the place in question. The offer was objected to and the objection sustained, whereupon appellant rested.

Appellants urge several grounds for reversal. For the purpose of this opinion, but one of the grounds will be considered. Appellants object to certain questioning of two of appellee's witnesses by appellee's counsel, with reference to the question of appellants being protected by insurance from the payment of damages because of such accident. Appellee's witness Frances Heizer, mother of the child who was ^{with} the deceased at the time of the accident, was interrogated by appellants attorney concerning certain statements made by her which were contained in a signed statement made soon after the accident, and which were in conflict with those made in her testimony upon the trial. In the first instance, she declined to answer the questions as to whether she had made such statements, but upon being instructed by the trial court that she must answer same, she did so. They were to the effect that her daughter Betty was west of the truck, while the deceased child was standing behind the truck with her back against the rear of the body where the driver could not see her; that the driver was one of the most careful drivers that came into that neighborhood; that she did not see the driver get in the truck nor did she see the accident. Following this, counsel for appellee examined the witness as to who took the written statement from her, to which the witness responded that she did not know. The witness was then asked the following question: "This Angus Ferdinand, as a matter of fact, was an adjuster for the insurance company, isn't that true?" Objection was made to this question, which objection was overruled, and before the witness could make any answer, the following question was asked: "From Peoria, isn't that true?" Subsequently reference was made by the attorney in referring to the party who took the statement as, "this adjuster." Appellee's witness Sargent had also signed a statement regarding the accident. He likewise was asked by appellants' counsel with regard to certain statements contained therein in contrast to those made in his oral testimony. This witness referred to the person taking his written statement as the representative of an insurance company, and further

Appellants were several grounds for reversal. For the purpose of this opinion, but one of the grounds will be considered. Appellants object to certain questioning of two of appellee's witnesses by appellee's counsel, with reference to the question of appellee being protected by insurance from the payment of damages because of such accident. Appellee's witness, James H. Hixson, brother of the child who was the deceased at the time of the accident, was interrogated by appellee's attorney concerning certain statements made by him which were contained in a signed statement made soon after the accident, and which were in conflict with the facts in the testimony upon the trial. In the first instance, he declined to answer the questions as to whether and on what date such statement, let alone being introduced in the trial court that was first answered later, and also so. They were to the effect that her daughter had been sent to the truck, while the deceased child was standing, during the time when her back against the rear of the body where the driver could not see her; that the driver was one of the most careful drivers that came into the neighborhood; that she did not see the driver, let in the truck nor did she see the accident. Following this, counsel for appellee examined the witness as to who took the written statement from her, to which the witness responded that she did not know. The witness was then asked the following question: "This James Hixson, a partner of fact, was an adjuster for the insurance company, isn't that true?" Objection was made to this question, which objection was overruled, and before the witness could make any answer, the following question was asked: "From memory, isn't that true?" Subsequently reference was made by the attorney in referring to the party who took the statement as, "this adjuster." Appellee's witness Hixson Hixson had also taken a statement regarding the accident. He likewise was asked by appellee's counsel with regard to certain statements contained therein in contrast to those made in his trial testimony. This witness referred to the person taking his written statement as the representative of an insurance company, and further

stated that such representative said: "If they settle it out of court, we are going to make them a nice present."

Statements of counsel which show that the defendant is protected from the payment of damages by an insurance policy, are improper. Bishop v. Chicago Junction Ry. Co. 289 Ill. 63, 67. An examination of the record discloses that counsel for appellee pressed the witness in an effort to produce a response disclosing that the written statement was made to a representative of an insurance company, and upon the witness' failure to so respond, appellee's counsel then injected the insurance question into the evidence by asking the above questions which included the answers sought from the witness, to which questions the witness merely responded "Yes, sir." The attorney must not testify for the witness. The intention here is as apparent as the attempt, and such we do not think could have failed to escape the notice and consideration of the jury. It is not the case of a witness making such an answer which was unresponsive to the question put and but a mere voluntary statement by the witness, as in the case of Williams v. Consumer's Co. 352 Ill. 51, 55. Cases of that character deal with inadvertent or unresponsive answers by a witness to a question which is a proper and legitimate one. It appears here to have been the apparent design of the examining counsel to induce the witness to make answer that the person who took the statement was an adjuster for an insurance company, and upon the witness' failure to so respond, the attorney stated such fact in the form of a pretended question. There appears to have been an obvious design and intent on the part of the attorney to prejudice the defendant by showing that it was protected against the payment of damages by an insurance policy. We are of the opinion that the only effect it could have had would be to convey to the jury an impression that the defendant dairy company was so protected. McCarthy v. Spring Valley Coal Co. 252 Ill. 473, 480. The verdict here was a substantial

stated that such representative said: "If they settle it out of court, we are going to make them a nice present."

Statements of counsel which show that the defendant is protected from the payment of damages by an insurance policy, are improper. *Stanton v. Chicago Junction Ry. Co.*, 285 Ill. 43, 67. An examination of the record discloses that counsel for appellee pressed the witness in an effort to produce a response indicating that the witness stated that it was made to a representative of an insurance company, and upon the witness' failure to so respond, appellee's counsel then injected the insurance question into the evidence in order to raise questions which included the answer sought from the witness, to this question the witness merely responded "Yes, sir." The witness did not testify for the witness. The intention of the witness is to deny the attempt, and such we do not think could be said to raise the notice and consideration of the jury. It is not the case of a witness making such an answer which was unresponsive to the question put and but a mere voluntary statement by the witness, as in the case of *Williams v. Commonwealth*, 300 Ill. 51, 52, 53, 54. Cases of that character deal with inadvertent or unresponsive answers by a witness to a question which is a proper and legitimate one. It appears here to have been the apparent design of the defendant's counsel to induce the witness to make answer that the benefit was taken the statement was an answer for an insurance company, and that the witness' failure to so respond, the attorney stated and put in the form of a pretended question. There appears to have been an obvious design and intent on the part of the attorney to exclude the defendant by showing that it was protected against the payment of damages by an insurance policy. It is one of the opinions that the witness that it could have and would be so covered to the jury in a position that the defendant's company was so protected. *Roberts v. Spring Valley Coal Co.*, 308 Ill. 473, 480. The verdict here was substantial.

one in this kind of an action, and the record should be free of such conduct of counsel. This court speaking through Mr. Presiding Justice Dove, in a former case where the circumstances were very similar to those involved herein, held that such statements were calculated to influence and prejudice the jury against the defendant. Peterson v. Jones, 283 Ill. App. 652.

The judgment herein is reversed and the cause remanded for a new trial.

Reversed and remanded.

one in this kind of an action, and the record should be free of such conduct of counsel. This court speaking through Mr. Justice Love, in a former case where the circumstances were very similar to those involved here, held that such statements were calculated to influence and prejudice the jury against the defendant.

Stetson v. Jones, 223 Ill. App. 602.

The judgment herein is reversed and the case remanded for a new trial.

Very truly,
Yours,
J. H. ...

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9366

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in
the year of our Lord one thousand nine hundred and thirty-eight,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

298 I.A. 628³

BE IT REMEMBERED, that afterwards, to-wit: On 61
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1938.

Richard H. Hindle, d/b/a
R.H. Hindle Realty Co.,

Appellee

vs.

Appeal from County Court

Commercial Travelers Loan
and Homestead Association,
a Corporation,

Peoria County.

Appellant.

HUFFMAN - J.

This was an action by appellee to recover for real estate broker's commission alleged to be due him from appellant, based upon the claim that he procured a purchaser for certain premises, who was ready, willing and able to make the purchase according to appellant's terms. The case was tried by jury and a verdict returned in favor of appellee for \$312.50. Appellant appeals from the judgment entered thereon.

Appellee was a licensed real estate broker residing in Peoria, and appellant a Loan and Homestead Association located in said city. It owned a certain residential property in Peoria. Appellee alleges that it listed this property with him to sell, at a designated price and upon certain terms; that he procured a purchaser therefor who was ready, willing and able to purchase the same at the price and upon the terms fixed by appellant; whereby appellant became indebted to appellee to pay the customary charges for such services, which was \$312.50. Appellant by its answer admitted the ownership of the premises in question and that appellee was a licensed real estate broker, but denied all other allegations of the complaint and denied that appellee was entitled to recover the damages alleged, or any part thereof.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER 1, 1934

Richard H. Hinde, Appellee,
vs.
Commercial Travelers Loan
and Homestead Association,
a Corporation, Appellant.

Appeal from County Court
Peoria County.

Appellant.

VERDICT - 1.

This was an action by appellee to recover for real estate broker's commission alleged to be due him from appellant, based upon the claim that he procured a purchaser for certain premises who was ready, willing and able to make the purchase according to appellant's terms. The case was tried by jury and a verdict returned in favor of appellee for \$312.50. Appellant appeals from the judgment entered thereon.

Appellee was a licensed real estate broker residing in Peoria, and appellant a loan and Homestead Association located in said city. It owned a certain residential property in Peoria. Appellee alleges that it listed this property with him to sell, at a designated price and upon certain terms; that he procured a purchaser therefor who was ready, willing and able to purchase the same at the price and upon the terms fixed by appellee; whereby appellee became indebted to appellee to pay the customary charges for such services, which was \$312.50. Appellant by its answer admitted the ownership of the premises in question and that appellee was a licensed real estate broker, but denied all other allegations of the complaint and denied that appellee was entitled to recover the damages alleged, or any part thereof.

The first count of the complaint consisted of what was formerly termed the common counts. Count two alleged that appellee was the procuring cause for the sale of the premises, whereas the proof showed that the premises were sold to parties other than the prospective purchaser submitted by appellee. Count three charged that appellee did present a proposed purchaser, "who was ready, willing and able to purchase the same for the price and upon the terms named by the defendant as aforesaid." Wherefore, it is alleged appellant became indebted to appellee in the amount claimed.

The premises in question were sold by appellant to parties other than the part presented by appellee, and the evidence does not tend in any way to support appellee's allegation that he was the procuring cause of the sale, as set out in the second count. Therefore, appellee must base his claim upon the third count, which alleged that he produced a purchaser who was ready, willing and able to purchase upon appellant's terms.

Appellant made motions and presented instructions for directed verdict at the close of the plaintiff's evidence and at the close of all the evidence, which motions were denied. After the verdict, appellant filed its motion for judgment notwithstanding the verdict and in arrest of judgment. Appellee urges that appellant not filing a motion for a new trial, cannot now question the sufficiency of the evidence to sustain the verdict, and in support thereof cites the cases of *Knotts v. Lakeshore & M.S.R. Co.* 172 Ill. App. 550; *Kortylak v. Johnson City B. & L. Ass'n.* 279 Ill. App. 88. In those cases, although the appellants filed motions for directed verdicts, the court found there was sufficient evidence to sustain the plaintiff's cause of action, and in the latter case cited, held "there was ample proof tending to sustain appellee's case, and where this is true, such a motion must be overruled." (p.96). It is urged by appellant that appellee's evidence is wholly lacking in any proof tending to establish the ability of the purchaser presented by him, to perform the contract; and that this is as necessary an element of

The first count of the complaint contained the following allegations: That the defendant, who was a resident of the State of California, had entered into a contract with the plaintiff, who was a resident of the State of California, for the purchase of certain real property. The defendant had failed to perform his obligations under the contract, and the plaintiff had been damaged thereby. The plaintiff sought damages for the breach of the contract.

The premises in question were sold by the defendant to the plaintiff. The defendant had failed to perform his obligations under the contract, and the plaintiff had been damaged thereby. The plaintiff sought damages for the breach of the contract.

Appellant made motions and presented instructions for directed verdict at the close of the plaintiff's evidence and at the close of all the evidence, which motions were denied. After the verdict, appellant filed its motion for judgment notwithstanding the verdict and in arrest of judgment. Appellee urges that appellant not filing a motion for a new trial, cannot now question the sufficiency of the evidence to sustain the verdict, and in support thereof cites the

cases of *Knotte v. Laxson & A. S. R. Co.* 172 Ill. App. 550; *Kortlyk v. Johnson City B. & L. Ass'n.* 272 Ill. App. 88. In those cases, although the appellants filed motions for directed verdicts, the court found there was sufficient evidence to sustain the plaintiff's cause of action, and in the latter case cited, held "there was ample proof tending to sustain appellee's case, and where this is true, such a motion must be overruled." (p. 88). It is urged by

appellant that appellee's evidence is wholly lacking in any proof tending to establish the ability of the purchaser represented by him, to perform the contract; and that this is as necessary an element of

the proof as it is of the complaint. Appellant therefore urges that the trial court erred in denying its motions at the close of plaintiff's evidence and at the close of all the evidence, for a directed verdict.

Appellant's motion to instruct the jury to find in its favor raised the question of the sufficiency of plaintiff's evidence, and whether there was any evidence which, considered in its most favorable aspect, fairly tended to prove the complaint. *Hunter v. Troup*, 315 Ill. 293, 296. Therefore, its motions for instructed verdicts, presented to the trial court the question of the sufficiency of plaintiff's evidence to support his complaint, even though appellant filed no motion for a new trial. This distinction is recognized in the case of *Louis K. Leggitt Co. v. Strum*, 243 Ill. App. 576, 580.

The evidence of appellee is to the effect that he secured a proposal from Thomas H. White and wife, to buy the property in question. Appellee presented the signed proposal to appellant, together with his check for \$100 as a deposit thereon, pending appellant's investigation of the credit rating of the prospective purchaser. It is thus apparent that the ability of the purchaser was at that time not known or determined. It appears that appellant's investigation disclosed certain unpaid judgments standing against the prospective purchaser. Appellant sold the premises to another party, and this suit resulted.

It is not claimed by appellee that he had the exclusive listing or exclusive right to sell the property in question. His check for \$100 was returned by appellant after it had declined the proposal to purchase the premises by the prospect secured by appellee. This prospect later negotiated with appellant for a contract of purchase for another property in Peoria. Appellee urges that appellant refused the first proposal in order to effect a later sale of this other piece of property to the said prospective purchaser, for the purpose of evading claim for commission by appellee. There is nothing in the evidence to sustain this.

the proof as it is of the complaint. The court therefore ordered that the trial court erred in denying its motion at the close of Plaintiff's evidence and at the close of all the evidence, for a directed verdict.

Appellant's motion to instruct the jury to find in its favor raised the question of the sufficiency of Plaintiff's evidence, and whether there was any evidence which, considered in its most favorable aspect, fairly tended to prove the complaint. *Hunter v. Brown*, 215 Ill. 233, 238. Therefore, its motion for instructed verdicts,

presented to the trial court the question of the sufficiency of Plaintiff's evidence to support his complaint, even though he did not file a motion for a new trial. This distinction is recognized in the case of *Louis E. Bedette Co. v. Brown*, 244 Ill. App. 572, 580.

The evidence of Appellee is to the effect that he received a proposal from Thomas L. White and wife, to buy the property in question.

Appellee presented the signed proposal to appellant, who then cashed his check for \$100 as a deposit thereon, sending appellant's investigation of the credit rating of the prospective purchaser. It is thus apparent that the ability of the purchaser was at that time not known or determined. It appears that appellant's investigation disclosed certain unpaid judgments standing against the prospective purchaser.

Appellant sold the premises to another party, and this suit resulted. It is not claimed by appellee that he had the exclusive listing or exclusive right to sell the property in question. His check for \$100 was returned by appellant after it had declined the proposal to purchase the premises by the prospect secured by appellee. This prospect later negotiated with appellant for a contract of purchase for another property in Peoria. Appellee urges that appellant refused the first proposal in order to effect a later sale of this other piece of property to the said prospective purchaser, for the purpose of evading claim for commission by appellee. There is nothing in the evidence to sustain this.

Appellant urges that it was incumbent upon appellee to show that he produced a purchaser who was ready, willing and able to perform the contract according to the terms thereof. This rule is well stated in *Wilson v. Mason*, 158 Ill. 304, at p. 309, as follows: "The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser, who is ready, willing and able to complete the purchase as proposed. This he must do before he is entitled to any commissions. If the vendor rejects the purchaser so produced, the broker is bound to show that such purchaser was willing, ready and able to perform the contract according to the proposed terms." This rule is also announced in *Olver v. Sattler*, 233 Ill. 536, 540; *Lucas v. Schwartz*, 243 Ill. App. 418, 423; *White v. Ames*, 179 Ill. App. 220; *Smith, Admr. v. Penn*, 151 Ill. App. 155, and many other cases. Thus we see that it is not only incumbent upon the plaintiff to show that his prospective purchaser was ready and willing to perform, but also that he was able to perform.

There is no evidence in the record tending to show the ability of appellee's prospective purchaser to perform the contract. Hence, there was no evidence to justify the jury in finding that he could raise sufficient money with which to comply therewith. The court erred in not granting appellant's motion for a directed verdict. The judgment is therefore reversed and the cause remanded for a new trial.

Reversed and remanded.

Appellant urges that it was incumbent upon appellee to show that he produced a purchaser who was ready, willing and able to perform the contract according to its terms. This rule is well stated in *Wilson v. Nelson*, 138 Ill. 504, 4 P. 308, as follows: "The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser, who is ready, willing and able to complete the purchase as proposed. This he must do before he is entitled to any commission. If the vendor rejects the purchaser so produced, the broker is bound to show that such purchaser was willing, ready and able to perform the contract according to the proposed terms." This rule is also announced in *Oliver v. Sattler*, 133 Ill. 586, 540; *Lucas v. Schwartz*, 84 Ill. App. 418, 423; *White v. Ames*, 175 Ill. App. 280; *Smith, Adams v. Tenn*, 151 Ill. App. 155, and many other cases. Thus we see that it is not only incumbent upon the plaintiff to show that his prospective purchaser was ready and willing to perform, but also that he was able to perform.

There is no evidence in the record tending to show the ability of appellee's prospective purchaser to perform the contract. Hence, there was no evidence to justify the jury in finding that he could raise sufficient money with which to comply therewith. The court erred in not granting appellant's motion for a directed verdict. The judgment is therefore reversed and the cause remanded for a new trial.

Reversed and remanded.

STATE OF ILLINOIS, }
 } ss.

SECOND DISTRICT

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



9367

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in
the year of our Lord one thousand nine hundred and thirty-eight,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

298 I.A. 629'

BE IT REMEMBERED, that afterwards, to-wit: On JAN 26 1938
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1938.

William F. Sell,

Appellee

vs.

Charles E. Gambill,

Appellant.

Appeal from Circuit Court
DeKalb County.

HUFFMAN - J.

This was a suit by appellee to recover real estate broker's commission. It was tried before the court and judgment entered in his favor for \$548 and costs. Appellant appeals from this judgment.

The services rendered by appellee were performed at the instance of appellant's brother. Appellee claims that the brother Henry Gambill, was acting as the agent of appellant Charles Gambill. Appellant denies that his brother Henry was acting as his agent, and contends that there was no agreement or undertaking between him and appellee in regard to the transaction, no agreement on his part to pay appellee anything, no request made by him to appellee to perform any services on his behalf, and therefore no liability to pay appellee the commission claimed.

There was no dispute that the commission claimed by appellee was the usual and customary rate charged by real estate brokers for such services in that vicinity. The basis of the defense to the suit, as stated by attorney for appellant, was that no agency existed between appellant and his brother Henry regarding the transaction in question. It appears that appellant owned several farms in DeKalb county; that his ^{brother} ~~brother~~ Henry was in his employ as supervisor of such farms; that his salary was \$30 a week; that Henry went to see appellee about a

IN THE
COURT OF THE COMMON PLEAS
OF THE COUNTY OF DEKALB
Georgia
JANUARY TERM, 1935.



William F. Self,

Appellee

vs.

Charles E. Gamaliel,

Appellant.

HURTMAN - 7.

This was a suit by appellee to recover real estate taxes. It was tried before the court and judgment entered in his favor for \$240 and costs. Appellee appeals from this judgment.

The services rendered by appellee were performed at the instance of appellant's brother. Appellee claims that the brother Gamaliel, was acting as the agent of appellant Charles Gamaliel. Appellant denies that his brother Henry was acting as his agent, and contends that there was no agreement or understanding between him and appellee in regard to the transaction, no agreement on his part to pay appellee anything, no request made of him to appellee to perform any services on his behalf, and therefore no liability to pay appellee the commission claimed.

There was no dispute that the commission claimed by appellee was the usual and customary rate charged by real estate brokers for such services in that vicinity. The basis of the defense to the suit, as stated by attorney for appellant, was that no agency existed between appellant and his brother Henry regarding the transaction in question. It appears that appellant owned several farms in Dekalb county; that his brother Henry was in his employ as supervisor of such farms; that his salary was \$30 a week; that Henry went to see appellee about a

farm (called the Woolsey farm), which was adjacent to a farm owned by appellant (called the Butler farm); and directed appellee to see if and on what terms the Woolsey farm could be acquired. Appellee did so, and advised Henry that the Woolsey farm had been foreclosed on by the Northwestern Mutual Life Insurance Company; that the redemption period had not yet expired; that a closed bank at Sycamore had taken a judgment on a note of the mortgagor in the principal sum of \$4400, which was a junior lien and subject to the rights of the above named mortgagee. Appellee suggested that they go to see the receiver of the closed bank in order to find out for how much the judgment could be bought, so that appellant might determine if he desired to place himself in a position where he could make redemption from the mortgage sale, and thus secure title to the farm in question. In response to this, Henry instructed appellee to secure information regarding the status of the matter. Appellee did so and reported to Henry. Henry stated to appellee that he would have his brother, the appellant, see the receiver of the bank with a view to ascertaining at what price the judgment could be purchased. Appellant did so, and purchased the judgment of the bank for \$200. Following this, appellant made redemption of the Woolsey farm in the sum of \$10,967.31. Appellant admits conversations with his brother Henry regarding the negotiations having to do with the acquisition of this farm. Following the consummation thereof, he gave to his brother Henry a check for \$100 to be delivered to appellee in payment for his services rendered in connection with the transaction. When Henry tendered the check to appellee he refused to accept same, and this suit resulted.

There was evidence in the case having to do further with the acts of the parties and the question of agency. The trial court saw and heard the witnesses testify, and thus had superior advantages over this court in determining the weight and credit that should be given the testimony. Under such circumstances, where the testimony by fair

farm (called the Woolsey farm), which was adjacent to a farm owned by appellant (called the Butler farm); and advised appellant to see it and on what terms the Woolsey farm could be sold. Appellant did so, and advised Henry that the Woolsey farm had been foreclosed on by the Northwestern Mutual Life Insurance Company; that the redemption period had not yet expired; that a closed bank at Chicago had taken a judgment on a note of the company in the amount of \$4,400, which was a junior lien and subject to the rights of the above named mortgage. Appellant suggested that Henry go to see the receiver of the closed bank in order to find out how soon the judgment could be bought, so that appellant might determine if he desired to place himself in a position where he could take redemption from the mortgage sale, and thus secure title to the farm in question. In response to this, Henry instructed appellant to secure information regarding the status of the matter. Appellant did so and reported to Henry. Henry instructed to appellant that he would have the brother, appellant, see the receiver of the bank with a view to ascertaining at what price the judgment could be purchased. Appellant did so, and purchased the judgment of the bank for \$200. Following this, appellant made redemption of the Woolsey farm in the sum of \$10,300.51. Appellant admits conversations with his brother Henry regarding the negotiations having to do with the acquisition of this farm. Following the consummation thereof, he gave to his brother Henry a check for \$100 to be delivered to appellant in payment for his services rendered in connection with the transaction. When Henry tendered the check to appellant he refused to accept same, and this suit resulted. There was evidence in the case having to do further with the sale of the parties and the question of agency. The trial court saw and heard the witnesses testify, and thus had superior advantages over this court in determining the weight and credit that should be given the testimony. Under such circumstances, where the testimony of fair

and reasonable intendment supports the judgment of the trial court, a court of review is reluctant to disturb the same, unless it clearly appears that the judgment is contrary to the manifest weight of the evidence.

The judgment herein is affirmed.

Judgment affirmed.

and reasonable inferences and upon the judgment of the trial court, a court of review is reluctant to disturb the jury's verdict or clearly appears that the judgment is contrary to the manifest weight of the

evidence.

The judgment herein is affirmed.

Witness my hand and seal of office at Chicago, Illinois, this 10th day of June, 1934.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9372

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in
the year of our Lord one thousand nine hundred and thirty-eight,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

298 I.A. 629²

BE IT REMEMBERED, that afterwards, to-wit: On JAN 26 1939
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1938.

Alice Davis,

Appellee

vs.

Frank H. Bankert,

Appellant

Appeal from Circuit Court,
LaSalle County.

HUFFMAN - J.

Appellee sued appellant for personal injuries sustained by a collision between an automobile in which she was riding, and an automobile then being operated by appellant. The cause was tried by jury, resulting in a verdict in favor of appellee for the sum of \$1000. Appellant prosecutes this appeal from the judgment entered upon the verdict.

It is charged by appellee that while riding in the rear seat of an automobile then owned and operated by her husband, and while she was in the exercise of due care for her own safety, appellant recklessly and negligently caused his automobile to collide with that in which appellee was riding, at a time when appellant was operating his automobile at a high rate of speed. The second count is substantially as the first count, except that it charges the appellant with wilful and wanton misconduct in the operation of his automobile, and that as a direct and proximate result of such wilful and wanton misconduct, the collision occurred whereby appellee sustained the injuries sued for.

The accident happened at about four thirty in the afternoon of June 3, 1934, on state highway No. 6 at a point about four miles west of Ottawa. The highway in question was of concrete with the usual black line running down the center thereof. The car in which appellee was riding was proceeding east upon the highway, and the

IN THE
COURT OF COMMON PLEAS
FOR THE COUNTY OF OTTAWA

FILE NO. 100-1000

Alice Davis,

Appellee

vs.

Frank L. Baker,

Appellant

HUTCHINSON - 1.

Appellee sued appellant for personal injuries sustained by a collision between an automobile owned and operated by appellee and an automobile then being operated by appellant. The cause was tried by jury, resulting in a verdict in favor of appellee for the sum of \$1000. Appellant presented the appeal from the judgment entered upon the verdict.

It is charged by appellee that while riding in the rear seat of an automobile then owned and operated by her husband, and while she was in the exercise of due care for her own safety, appellant recklessly and negligently caused his automobile to collide with that in which appellee was riding, at a time when appellant was operating his automobile at a high rate of speed. The second count is substantially as the first count, except that it charges the appellant with willful and wanton misconduct in the operation of his automobile, and that as a direct and proximate result of such willful and wanton misconduct, the collision occurred whereby appellee sustained the injuries sued for.

The accident happened at about four thirty in the afternoon of June 3, 1934, on State Highway No. 6 at a point about four miles west of Ottawa. The highway in question was of concrete with the usual black line running down the center thereof. The car in which appellee was riding was proceeding east upon the highway, and the

car then being operated by appellant was proceeding west. It is claimed by appellee that the car in which she was riding was travelling at the rate of about twenty miles an hour; that appellant's car was approaching at about sixty or sixty-five miles per hour, and was weaving back and forth across the center line of the pavement; that as the two cars approached a point where they were about to pass, that appellant's car came across the black line and ran into the car in which appellee was riding, while it was in its proper traffic lane, on the south side of the center line of the pavement. The car in which appellee was riding left the pavement and turned over in a ditch. Appellee was thrown through the windshield and the top of the car.

Appellant by his answer denied the charges of negligence and wilful and wanton misconduct; denied that the collision was caused by his driving his car across the center line of the pavement, into the car in which appellee was riding; and denied that appellee sustained her injuries through any negligence of his or through any wilful or wanton misconduct on his part.

It appears from the evidence of appellee's husband that he was by occupation the driver of a motor truck; that he owned the pleasure car in which appellee was riding at the time in question; that his wife and four children were in the car at the time of the accident; that shortly before the collision, a truck passed his car; that he thereafter followed behind the truck; that he first saw appellant's car when it was about nine hundred feet east; that as appellant's car passed the truck, it started toward his car; that it then started to curve back toward its proper traffic lane, when it again swung over the black line toward his car. He states that when this occurred, the cars were about in a position to pass and that he drove his car off the pavement to his right, in an effort to escape the oncoming car of appellant; that he was unsuccessful and that appellant's car struck his car on the left front portion, knocking off the left front wheel, thus causing his car to leave the road and turn over in a

car then being operated by appellant was proceeding west. It is claimed by appellee that the car in which she was riding was traveling at the rate of about twenty miles an hour; that appellant's car was approaching at about sixty or seventy-five miles an hour, and was weaving back and forth across the center line of the pavement; that as the two cars approached a point where they were about to pass, that appellant's car came across the center line and ran into the car in which appellee was riding, while it was in the process of passing. On the south side of the center line of the pavement, the car in which appellee was riding left the pavement and turned over in a ditch. Appellee was thrown through the windshield and over the top of the car.

Appellant, by his answer denied the charges of negligence and willful and wanton misconduct; stated that the collision was caused by his driving his car across the center line of the pavement, into the car in which appellee was riding; and denied that appellee sustained her injuries through any negligence of his or through any willful or wanton misconduct on his part.

It appears from the evidence of appellee's husband that he was by occupation the driver of a motor truck; that he owned the pleasure car in which appellee was riding at the time in question; that his wife and four children were in the car at the time of the accident; that shortly before the collision, a truck passed his car; that he thereafter followed behind the truck; that he first saw appellant's car when it was about nine hundred feet away; that as appellee's car passed the truck, it started toward his car; that it then started to curve back toward the proper traffic lane, when it again swung over the black line toward his car. He states that when this occurred the cars were about in a position to pass and that he drove his car off the pavement to the right, in an effort to escape the oncoming car of appellant; that he was unsuccessful and that appellant's car struck his car on the left front portion, knocking off the left front wheel, thus causing his car to leave the road and turn over in a

ditch. It is claimed by Davis that appellant was driving at the rate of about sixty-five miles per hour; that the road was straight and level; and that there was no traffic.

It is claimed by appellant that the Davis car started across the center line of the pavement toward his car, and that he drove off the pavement and out upon the shoulder on his side of the road, in an effort to avoid the accident; that he was unsuccessful in his attempt to escape the oncoming car operated by Davis, and that the Davis car continued across the black line of the pavement, across appellant's traffic lane and into appellant's car. Appellant states that he was driving at the speed of fifteen miles per hour at the time, and that the Davis car was travelling thirty-five. Appellant claims that after the accident, the two cars were about one hundred twenty-five feet apart. He states that following the accident, he went to the Davis car where he remained for probably a minute and a half; that he did not state who he was nor ask them who they were.

Riding in appellant's car at the time of the accident were Mr. Emmerling, Sr., Mr. Emmerling, Jr., Miss Beth Neubauer and Mr. Emmerling's daughter. Mr. Emmerling testified that the Davis car was weaving back and forth across the center line of the pavement and that after appellant had reduced the speed of his car to about fifteen miles an hour, the Davis car came across the pavement into appellant's traffic lane and ran into appellant's car. Another witness, Henry Lenzing, testified for appellant, stating that he was driving his car behind the Davis car and that it was weaving back and forth across the pavement and ran into appellant's car. Mrs. Lenzing also testified that the Davis car was across the center line of the pavement and in appellant's traffic lane at the time of the collision.

Appellee, her husband, a married daughter and her husband, were all occupants of the Davis car, and all supported by their testimony the charges appellee made against appellant with respect to the operation of his car. The witnesses and their testimony on

It is claimed by Davis that appellant was driving on the right side of the road at the time of the collision. It is claimed that appellant was driving on the right side of the road at the time of the collision. It is claimed that appellant was driving on the right side of the road at the time of the collision.

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Witnessing, Jr., wife of the deceased and Mr. ... testified that the Davis car was weaving back and forth across the center line of the pavement and that after appellant had reduced the speed of the car to about fifteen miles an hour, the Davis car came across the pavement into appellant's traffic lane and ran into appellant's car. Another witness, Henry ... testified for appellant, stating that he was driving his car behind the Davis car and that it was weaving back and forth across the pavement and ran into appellant's car. Mrs. ... also testified that the Davis car was across the center line of the pavement and in appellant's traffic lane at the time of the collision.

Appellee, her husband, a married daughter and her husband, were all occupants of the Davis car, and all supported by their testimony the charges appellee made against appellant with respect to the operation of his car. The witnesses and their testimony on

behalf of appellant, have been referred to. The evidence of the respective parties is irreconcilable, and that of each side when considered alone, is incompatible with the situation as presented by the witnesses on the opposite side. Under such circumstances, it was the function of a jury to pass upon the credibility of the witnesses. In addition to this, the trial court had the advantage of seeing and hearing them testify. The testimony is hopelessly conflicting. The witnesses on opposite sides have ~~xx~~ testified to entirely opposite conclusions, and in such cases it is the peculiar province of a jury to determine which set of witnesses they are going to believe. The Judge and the jury who try a case, have superior advantages over a court of review in this respect. They see the witnesses and observe them while testifying. This gives them vastly superior advantages in determining the weight and credit that should be given the testimony. These considerations have led to the adoption of the rule that where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, a court of review will not disturb the same unless it clearly appears that the verdict is contrary to the weight of the evidence. Where the evidence is so conflicting and yet so positive, that that of each party when considered alone, might be sufficient to support a verdict, the rule above referred to is usually followed by a court of review for the reasons stated.

The proof of each party is, that while he was off the pavement and upon the shoulder on his own side of the road, the other came across the pavement and ran into him. The impossibility of this situation is at once apparent. The cars could have no more collided under such circumstances, than if they had been standing still.

Appellant urges three grounds for reversal. The first urged is that the verdict is against the weight of the evidence. Appellant with reference to this point, urges that the evidence of the respective parties is so divergent as to make it conclusive that one side or the other could not be telling the truth. It is then urged that the witnesses for appellant stated the true facts.

defect of appellant, have been referred to. The evidence of the respective parties is inconclusive, and that of each side when considered alone, is inconclusive with the situation presented by the witnesses on the opposite side. Under such circumstances, it was the function of a jury to pass upon the credibility of the witnesses. In addition to this, the trial court had the advantage of seeing and hearing them testify. The testimony is necessarily conflicting. The witnesses on opposite sides have no testimony entirely opposite conclusions, and in each case it is the province of a jury to determine which set of witnesses they are going to believe. The judge and the jury was in a case, where superior advantages over a court of review in this respect. They see the witnesses and observe them while testifying. They then testify superior advantages in determining the weight and effect that should be given the testimony. These considerations have led to the adoption of the rule that where there is a discrepancy of evidence and the testimony is fair and reasonable, judgment will authorize the verdict, a court of review will not disturb the same unless it clearly appears that the verdict is contrary to the weight of the evidence. Where the evidence is so conflicting and yet so positive, that that of each party when considered alone, might be sufficient to support a verdict, the rule should be referred to it usually followed by a court of review for the reasons stated.

The proof of each party is, that while he was off the pavement and upon the shoulder on his own side of the road, the other came across the pavement and ran into him. The impossibility of this situation is at once apparent. The cars could have no more collided under such circumstances, even if they had been standing still.

Appellant urges three grounds for reversal. The first urged is that the verdict is against the weight of the evidence. Appellant with reference to this point, urges that the evidence of the respective parties is so divergent as to make it conclusive that one side or the other could not be telling the truth. It is then urged that the witnesses for appellant stated the true facts.

Where the positions of the litigants are so diametrically opposed, it is in the first instance a question of fact for the jury to decide as to where lies the truth. In the state of the record, this court does not feel justified in disturbing the verdict on the facts.

The second ground urged for reversal is that the verdict is excessive. The testimony of the surgeon at the hospital where appellee was taken is, "that she was blood all over; that her teeth were knocked out; that she was bleeding from the mouth and nose; had a scalp wound through to the skull; and other cuts and bruises." She was in the hospital for a week and after that, returned for dressings over a period of about ten days. It might be said that the damages awarded were substantial, but they do not appear to be a result of passion or prejudice on the part of the jury, and under the records as it exists, we cannot say they are excessive.

The third ground argued for reversal is directed toward instructions number 2, 3, 4 and 6 given on behalf of appellee, Instruction number 2 told the jury that the negligence of the driver of the automobile in which appellee was riding, could not be imputed to her, if she was in no way the cause of such negligence, and omitted no reasonable or ordinary care for her own safety. The instruction as given is identical with instruction number 13 appearing in the case of Thompson v. Atchinson T. & G.F. Ry. Co. 258 Ill. App. 123 at p. 130. The instruction was there approved with authorities cited.

Instruction number 3 had to do with the fixing of plaintiff's damages and told the jury that in determining same they had the right to take into consideration the nature and extent of the injuries received, if any, resulting from the collision in question, so far as the same were shown by the evidence, and the pain and suffering in body and mind, if any, resulting to the plaintiff because of such injuries. Appellant objects to this instruction because of the inclusion therein of the element of "mental suffering" as a basis for money damages. The fair import of the instruction

where the position of the victim was at the time of the accident, it is in the first place a question of fact for the jury to decide as to where lies the truth. In the second place, this Court does not feel justified in determining the truth of the facts.

The second ground urged for reversal is that the verdict is excessive. The testimony of the surgeon at the hospital where appellee was taken is, "that she was blood all over; but her vital were shocked only; that she was bleeding from the nose and mouth; had a scalp wound through to the skull; and other cuts and abrasions." She was in the hospital for a week and then sent home, remaining over a period of about ten days. It might be said that the damages awarded were substantial, but they do not appear to be a result of passion or prejudice on the part of the jury, and under the records as it exists, we cannot say that are excessive.

The third ground urged for reversal is directed toward instructions number 3, 4 and 5 given on behalf of appellee. Instruction number 3 told the jury that the negligence of the driver of the automobile in which appellee was riding, could not be imputed to her, if she was in no way the cause of such negligence, and omitted no reasonable or ordinary care for her own safety. The instruction as given is identical with instruction number 13 except that in the case of Thompson v. Atkinson, 12 S.W.2d 253, 111 App. 185 at p. 190. The instruction was then approved with authorities cited.

Instruction number 4 had to do with the timing of plaintiff's damages and told the jury that in determining same they had the right to take into consideration the nature and extent of the injuries received, if any, resulting from the collision in question, so far as the same were shown by the evidence, and the pain and suffering in body and mind, if any, resulting to the plaintiff because of such injuries. Appellant objects to this instruction because of the inclusion therein of the element of "mental suffering" as a basis for money damages. The fair import of the instruction

with reference to the phrase "her pain and suffering in body and mind, if any, resulting from such injuries," infers that the pain and suffering in body and mind shall be a consequence or result of the physical injuries received, and that the mental pain and suffering contemplated was such as accompanied or naturally flowed from the physical injuries. This element of damages has been approved in *Chicago & Milwaukee Elec. Ry. Co. v. Ullrich*, 213 Ill. 170. We do not consider this instruction subject to the objections made.

Instruction number 4 told the jury that it was not necessary for the plaintiff to place witnesses upon the stand to testify as to what amount of damages she should receive for her injuries, but that if the jury found the defendant guilty, they were to determine the question of damages from their ordinary experience as men, and from all the evidence upon the question. Appellant argues that this instruction confused the jury, but we do not so consider. It was the function of the jury to fix the amount of damages in the event they found for the plaintiff, and in arriving at such damages, they must necessarily exercise their faculties as jurors based upon their ordinary experience in life.

Appellee's instruction number 6 was based upon the second count of the complaint, which charged wilful and wanton misconduct on the part of appellant. Appellant objects to this instruction on the ground that it did not properly define wilful and wanton misconduct or wilful and wanton disregard of the rights of others. Appellee's fifth instruction given the jury just prior to the one complained of, contained elements of wilful and wanton misconduct relative to its charge in this case as made against appellant. It is necessary that instructions should be considered as a series, because in many instances all of the elements of a case cannot be covered in one instruction of a reasonable length.

It is also urged by appellant that there is no evidence in the record going to show wilful and wanton ~~xx~~ conduct on his part and that therefore the court committed error in giving instructions

with reference to the phrase "nerve pain and inflammation in body and mind, if any, resulting from the injuries," in that the pain and suffering in body and mind shall be a consequence or result of the physical injuries received, and that the mental pain and suffering contemplated was such as accompanied or naturally flowed from the physical injuries. This element of damages has been approved in Chicago & Milwaukee Elec. Ry. Co. v. Ullrich, 223 Ill. 170. We do not consider this instruction subject to the objections made. Instruction number 4 tells the jury that it was not necessary for the plaintiff to place witnesses upon the stand to testify as to what amount of damages she should receive for her injuries, but that if the jury found the defendant guilty, they were to determine the question of damages from their ordinary experience as men, and from all the evidence upon the question. Appellant states that this instruction confused the jury, but we do not so consider. It was the function of the jury to fix the amount of damages in the event they found for the plaintiff, and in arriving at such damages, they must necessarily exercise their facilities as jurors based upon their ordinary experience in life.

Appellee's instruction number 6 was based upon the second count of the complaint, which charged willful and wanton misconduct on the part of appellant. Appellant objects to this instruction on the ground that it did not properly define willful and wanton misconduct or willful and wanton disregard of the rights of others. Appellee's fifth instruction given the jury just prior to the one complained of, contained elements of willful and wanton misconduct relative to its charge in this case as made against appellant. It is necessary that instructions should be considered as a series, because in many instances all of the elements of a case cannot be covered in one instruction of a reasonable length.

It is also urged by appellant that there is no evidence in the record going to show willful and wanton misconduct on his part and that therefore the court committed error in giving instructions

to the jury based upon that element. Appellee's evidence, if taken as true, would tend to support the charge of wilful and wanton conduct on the part of appellant. For this reason, the Court did not err in submitting that question to the jury.

The judgment herein is affirmed.

Judgment affirmed.

to the jury based upon that evidence. Appellants' evidence, if taken as true, would tend to support the charge of willful and wanton conduct on the part of appellants. For this reason, the Court did not err in submitting that question to the jury.

The judgment herein is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9986

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in
the year of our Lord one thousand nine hundred and thirty-eight,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

298 I.A. 629³

BE IT REMEMBERED, that afterwards, to-wit: On JAN 16 1939
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1936.

Agnes M. Winger,

Appellee

Appeal from Circuit Court

vs.

Peoria County.

Fred R. Winger,

Appellant.

HUFFMAN - J.

This was an action for separate maintenance brought by appellee against appellant. The cause was referred to a Master, who found the facts in favor of appellee and recommended a decree for separate maintenance and that appellant be ordered to pay to appellee the sum of \$10.00 per week. Objections were filed to the Master's report, which stood as exceptions thereto before the trial court. The trial court overruled the exceptions, allowed appellee's solicitors a fee of \$150, granted decree for separate maintenance and ordered therein that appellant pay to appellee the sum of \$7.50 per week. Appellant brings this appeal from the above decree.

Each of the parties had been married before. They contracted this marriage on February 25, 1936, and separated on April 28, 1937. Appellee was a Danish woman, aged fifty-four. Appellant's age is fifty-three. Appellee charges that appellant left her without reasonable cause, and since said time has failed and refused to provide for her, and that she has no funds or property with which to support herself. Appellant was a man of considerable business experience, having been the head of the Peoria Milling Company, which company failed in 1932, and in which failure he states he lost everything he had. Subsequent to that time, he commenced working as a salesman for a real estate firm in Peoria. The inception of the

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

COTOMBA, Appellant,
v.
Agnes M. Winger, Appellee

Appeal from Circuit Court

Peoria County.

vs.

Fred R. Winger,

Appellant.

UPPER - 1.

This was an action for separate maintenance brought by appellee against appellant. The cause was referred to a Master, who found the facts in favor of appellee and recommended a decree for separate maintenance and that appellant be ordered to pay to appellee the sum of \$10.00 per week. Objections were filed to the Master's report, which stood as exceptions therefor before the trial court. The trial court overruled the exceptions, allowed appellee's solicitors a fee of \$150, granted decree for separate maintenance and ordered therein that appellant pay to appellee the sum of \$7.50 per week. Appellant brings this appeal from the above decree.

Each of the parties had been married before. They contracted this marriage on February 25, 1936, and separated on April 28, 1937. Appellee was a Danish woman, aged fifty-four. Appellant's age is fifty-three. Appellee charges that appellant left her without reasonable cause, and since said time has failed and refused to provide for her, and that she has no funds or property with which to support herself. Appellant was a man of considerable business experience, having been the head of the Peoria Milling Company, which company failed in 1932, and in which failure he states he lost everything he had. Subsequent to that time, he commenced working as a salesman for a real estate firm in Peoria. The inception of the

romance took place while appellant was working for the above firm and appellee a customer thereof. It was a speedy romance. The appellant says that he was "busted" at the time of marriage; that appellee knew he was busted, but she said that made no difference and agreed to take him anyway. He further claims that she was a very wealthy woman at the time and stated she was willing to pay all living expenses if he would marry her. He claims that as an additional inducement to the marriage contract, she agreed to take him on a wedding trip to Florida. It appears that following the marriage in February, they took the wedding trip. Appellant complains that while stopped at a hotel in Nashville, Tennessee, on the way to Florida, and while he was soundly sleeping, appellee invoked the common prerogative of a wife by rifling his pockets and extracting therefrom the sum of \$40, the only money of which he was possessed. He also insists that appellee at this time was in a highly intoxicated state. They proceeded to Florida, where appellant says they attended the races, at which times he persuaded appellee to make certain monetary advances to him, in the use of which it appears he was most fortunate, increasing the total some twelve or fifteen times by his ability to determine in advance which horse would win. The honeymoon seems to have been one of accord and satisfaction after the parties reached the sunny shores of Florida, where they enjoyed the beauties of that magic land, disporting themselves on the warm sands of the sea, and engaged in the sport of kings.

They returned to Peoria March 30, 1936. Appellant says that at the time of the marriage, appellee agreed to let him use her automobile in his business as a real estate salesman. He claims that in April, 1937, she refused to any longer permit him to so use her car. It was not long after this that he removed his personal effects from the apartment where they were living. He insists that he had nothing before the marriage, and that now he has less. It further appears that before he would marry appellee,

romance took place while appellant was working for the same firm and appellee was a customer thereof. It was a speedy romance. The appellant says that he was "arrested" at the time of marriage; that appellee knew he was arrested, but was willing to marry him and agreed to take him anyway. The further claims that she was a very wealthy woman at the time and stated she was willing to pay all living expenses if he would marry her. He claims that as an additional inducement to the marriage contract, she agreed to give him on a wedding trip to Florida. It appears that following the marriage in February, they took the wedding trip. Appellant complains that while stopped at a hotel in Nashville, Tennessee, on the way to Florida, and while he was soundly sleeping, appellee invoked the common prostitute of a wife by riding his pockets and extracting therefrom the sum of \$40, the only money of which he was possessed. He also states that appellee at this time was in a highly intoxicated state. They proceeded to Florida, where appellant says they attended the races, at which times he purchased appellee to make certain monetary advances to him, in the use of which it appears he was most fortunate, increasing the total some twelve or fifteen times by his ability to determine in advance which horse would win. The honeymoon seems to have been one of accord and satisfaction after the parties reached the sunny shores of Florida, where they enjoyed the beauties of that magic land, disappearing themselves on the warm sands of the sea, and engaged in the sport of kings.

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he insisted she advance to him \$500 which he still owed to his former wife. He says appellee was so anxious to consummate the marriage, that she did advance him this sum of money, which he used to pay off the above obligation. He insists that the methods used by appellee in the courtship, were such as to beguile an unsuspecting person; that she gave him a birthday party with invited guests, whereat she presented him with a diamond stickpin worth \$275, and a diamond ring worth \$350; that she later presented him with an expensive cigarette case and with a hundred dollar overcoat. Being moved by these acts of generosity on her part, he caused a diamond to be removed from his fraternity ring, which he cherished very highly, and had it mounted in a ring which he presented to her.

As happens in so many instances, it developed that appellee did not possess the wealth with which appellant thought she was blessed. Along about April 1, 1937, she told him that her money was about exhausted, to which she says he replied, "If your money is gone, I am gone."

Appellee denies that she refused appellant the use of her car, as he claimed. She testified that at the time of the marriage, she had about \$3700 in cash, which the two of them spent during the following year. Some years previous to this marriage, appellee did inherit fifteen or twenty thousand dollars in money and property from a deceased husband. Following that, she returned to Denmark, where she spent about a year in visiting her relatives and her native land. She now insists that she has had to borrow money on her automobile. It appears that she furnished the money during the period these parties lived together. The record fails to disclose any pronounced ability on her part to handle money. She appears to be an improvident as well as an unwise spender. There is nothing to indicate a capacity to produce.

Appellant claims appellee was very jealous of him and that he objected to such jealousy; that she insisted on going with him to baseball games and other public functions; that he remonstrated with her thus interfering with his right to go out alone, but that his objections were unavailing. He says that the argument they had in

he insisted she advance to him \$500 which he still owed to his former wife. He says appellee was so anxious to consummate the marriage, that she did advance him this sum of money, which he used to pay off the above obligation. He insists that the method used by appellee in the courtship, were such as to beguile an unsuspicious person; that she gave him a birthday party with invited guests, whereat she presented him with a diamond watchpin worth \$75, and a diamond ring worth \$50; that she later presented him with an expensive cigarette case and with a hundred dollar overcoat. Being moved by these acts of generosity on her part, he caused a diamond to be removed from his left ring, which he cherished very highly, and had it mounted in a ring which he presented to her.

As happens in so many instances, it developed that appellee did not possess the wealth with which appellant thought she was blessed. About April 1, 1937, she told him that her money was about exhausted, which she says he replied, "If your money is gone, I am gone."

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April when she refused to let him use her car in the real estate business, resulted in his leaving the apartment, where they were living, and securing quarters of his own. Nothing he states occurred in that argument is sufficient to excuse his abandoning and leaving appellee. She denies she gave him any cause to leave and the record fails to disclose any sufficient cause.

Proof of the wealth with which appellant claims appellee was possessed and of which he claims she boasted, does not appear in the record. He claims she told him during their marriage relation that she had plenty of money, and mentioned various large investments which were paying her good dividends. She denies ever making such statements. However, the claim of riches and the possession thereof, are different things. It would appear that if any such statements were made by appellee, they were but idle boasting or the result of incapacity to properly estimate money values. We are of the opinion that appellant prior to the time of separation had arrived at this conclusion, and this marriage suffered the fate common to all such undertakings.

Appellant urges his physical condition and his limited earning capacity as reasons why he should not be compelled to pay the amount awarded. He placed his physician upon the stand, who testified appellant was afflicted with a heart ailment, and that he had given him the Kahn test, the results of which the physician refused to reveal. The doctor stated that the most essential treatment for appellant would be the method in which he conducted his personal living and habits.

The record fails to show that appellee gave appellant any reasonable cause for living separate and apart from her. Under such circumstances, the burden was upon him to show that he had reasonable grounds for leaving. *Bartlow v. id.* 114 Ill. App. 604. It is generally considered that the reasonable cause to justify desertion, where the cause is claimed to be the ill conduct of the deserted party, must be such as would of itself entitled the other party to a divorce. *Frank v. id.* 178 Ill. App. 557.

The decree herein is affirmed.

Decree affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9557

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in
the year of our Lord one thousand nine hundred and thirty-eight,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

298 I.A. 629⁴

BE IT REMEMBERED, that afterwards, to-wit: On JAN 28 1939
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1938.

Chester B. Howe,

(Plaintiff) Appellee,

vs.

Pearl G. Howe,

(Defendant) Appellant.

Appeal from Circuit

Court, McHenry County.

WOLFE, J.

Chester B. Howe filed a suit in the Circuit Court of McHenry County against his wife, Pearl G. Howe, in which he alleged she had without any just or reasonable cause, wilfully deserted him for a space of several years and asked for a divorce. To this complaint, the defendant filed an answer, denying that she wilfully and without just cause deserted her husband, and alleges that the plaintiff had wilfully absented himself from the defendant without any just and reasonable cause. She denied that the plaintiff had conducted himself, as an affectionate husband, or adequately provided for his family.

The case was tried before the Court without a jury and at the close of the plaintiff's testimony, the Court, of his own motion, stated "I am granting this divorce to the plaintiff as a matter of law on the evidence and facts, including the admissions of the defendant in evidence in this case. The Clerk may enter there, "Proofs heard; judgment in favor of the plaintiff for divorce against the defendant on the grounds of desertion." The defendant,

IN THE
COURT OF THE DISTRICT OF COLUMBIA
JULY 1, 1937.

Chester B. Lowe,
(Plaintiff),
vs.
Pearl G. Lowe,
(Defendant).

CLERK, J.

Chester B. Lowe filed a bill in the District Court of the District of Columbia against his wife, Pearl G. Lowe, in which he alleged she had without any just or reasonable cause, wilfully deserted him for a space of several years and asked for a divorce. To this complaint, the defendant filed an answer, denying that she wilfully and without just cause deserted her husband, and alleging that the plaintiff had wilfully separated himself from the defendant without any just and reasonable cause. The Court set the bill aside and conducted himself, as an affectionate husband, or at least so provided for his family.

The case was tried before the Court without a jury and at the close of the plaintiff's testimony, the Court, of his own motion, stated "I am granting this divorce to the plaintiff as a matter of law on the evidence and facts, including the admissions of the defendant in evidence in this case. The Clerk may enter there, 'Prose heard; judgment in favor of the plaintiff for divorce against the defendant on the grounds of desertion.' The defendant,

through her attorneys, offered to put in evidence to rebut the testimony given by the plaintiff and his witnesses, but the Court refused to hear any testimony on behalf of the defendant. Upon what theory of the case the Court refused to allow the defendant and her witnesses to testify is impossible for this Court to understand. Certainly the defendant had a right to be heard upon her theory of the case. The judgment of the Circuit Court of McHenry County is hereby reversed and the case remanded for a new trial.

Reversed and Remanded.

through her attorneys, offered to put in evidence of her testimony given by the plaintiff and his witnesses, but the court refused to hear any testimony on behalf of the defendant. Upon what theory of the case the Court refused to allow the defendant and her witnesses to testify is beyond this for this Court to understand. Certainly the defendant was entitled to be heard upon her theory of the case. The judgment of the Circuit Court of Montgomery County is hereby reversed and the case remanded for a new trial.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



Abstract
denied January 3-1939
702

PUBLISHED IN ABSTRACT

William Schmidgall, Plaintiff-Appellee, v. Pekin Loan
and Homestead Association, Pekin, Illinois
Defendant-Appellant.

Appeal from Circuit Court Tazewell County.

APRIL TERM, A. D. 1938.

298 I.A. 629

Gen. No. 9123

Agenda No. 6

MR. JUSTICE FULTON delivered the opinion of the Court.

The Appellee William Schmidgall who is the Plaintiff in this cause filed a suit in equity, asking for an accounting from the Appellant Pekin Loan and Homestead Association, as to the value of 100 shares of stock of the Defendant Association on May 23, 1932, and also that the value of said stock be applied in payment of two mortgages held by the said Pekin Loan and Homestead Association, and the balance of the value of said stock paid to the Appellee.

Answer of the Defendant and Replication of the Plaintiff were duly filed and the cause was referred to the Master in Chancery of the Circuit Court to take the proofs and report the same together with his conclusions of law and fact to the Court. The Master recommended a decree in favor of the Appellee, exceptions to said report were filed and overruled and the Court entered a decree in accordance with the finding of the Master. The Appellant seeks the reversal of such decree. To our minds the controversy is largely one of fact.

In February, 1931, the Appellee and one Joseph J. Jost were engaged as partners in the brick and cement work business and during that month agreed upon a dissolution of the partnership affairs to be effective as of March 1, 1931. Among the assets of the partnership was Certificate No. 6370, for 100 shares of stock in the Appellant Association, also a lot commonly described as the Hamilton Street property, title to which stood in the name of J. J. Jost and which was subject to a mortgage for \$2,200.00, in favor of the Defendant Association. Appellee also owned some other real estate individually which was subject to a \$4,000.00,

mortgage to the Appellant. On February 28, 1931, the Appellee and his partner Jost went to the office of the Appellant and informed the secretary of the Association, who was in charge of the management of said company, that they had agreed upon a dissolution of their partnership, and requested the secretary to ascertain the present value of Certificate No. 6370. They notified the secretary George A. Heilman, that under the dissolution agreement the Appellee William Schmidgall was to become the owner of the said 100 shares of stock covered by said certificate. From this point there is a direct conflict in the testimony as to what happened on that occasion. The evidence was confined mainly to that of the Appellee on the one hand and that of George A. Heilman, secretary of Appellant Association, on the other. The Appellee states that the unsigned certificate was left with the secretary at the latter's suggestion for the purpose of making up a statement of its value when the March semi-annual statement of the Association came out; that later and on or about March 20, 1931, he went back to the office of the Association and endorsed Certificate No. 6370 on the back thereof; that the said certificate was not at that time endorsed by J. J. Jost; that he never saw the certificate from that date until October 17, 1934, at which time the name of J. J. Jost appeared endorsed upon the back of said certificate; that during all that period of time the Plaintiff had been informed by the said secretary of the Appellant Association that J. J. Jost had never signed or endorsed such certificate; that under the dissolution agreement the Appellee was to have as his separate property in addition to certificate No. 6370, the real estate designated as the Hamilton Street property; that after March, 1931, all the monthly dues and interest on the two mortgage loans up to and including May, 1932, were paid by Appellee to the Appellant Association; that on May 23, 1932, the Appellee advised the secretary Heilman that he could not continue to make the payments and carry the stock and loans any longer and requested the said secretary to cancel the stock represented by Certificate No. 6370, pay off the two loans and return the balance to him, the Appellee; that a day or two later he returned to the Association office and Heilman gave him a statement showing a balance due on the Certificate over and above the amount due on the two mortgages of \$1,273.70; that Heilman told him that the Associa-

tion could not go any farther with the transaction because Jost had never come in to sign the stock certificate; that Appellee advised Heilman that Jost had died on December 11, 1931, and he would have Mrs. Jost, the widow and Administratrix of the Jost Estate come down and sign the Certificate; that no payments were made by Appellee on the certificate and no interest on the two mortgages after May, 1932; that at the time of his death Jost had not paid the balance of money due the Appellee under the terms of the dissolution agreement; that deeds to evidence and carry out the terms of the settlement had not been executed prior to the death of Jost and that disagreement had arisen between the Appellee and the Jost Estate so that no complete settlement had been made up to October 17, 1934, when the parties all met for the purpose of attempting a settlement; that at that meeting Appellee found out for the first time that the name of J. J. Jost appeared endorsed on Certificate No. 6370; that on said date the secretary of Appellant asserted that the value of said certificate was \$4,200.00, and that the balance due on the mortgage loans was \$4,288.50, leaving a net balance due the Association of \$88.50; that on said date without any notice to Appellee the said Certificate was cancelled and marked paid by Heilman in behalf of the Association.

George A. Heilman, the secretary of the Appellant Association, testified that when the Appellee and Jost called upon him in February, 1931, the Certificate was signed by both the Appellee and J. J. Jost, and that it was left with him as Secretary of the Association in escrow to be delivered to the Appellee, William Schmidgall, when the partnership affairs between Schmidgall and Jost had been fully adjusted and settlement made and then it should be delivered to Appellee. He denied that during May, 1932, the Appellee, or any one for him, requested Heilman to cash Certificate No. 6370, and apply its value to the payment of the mortgages, and that no such request was ever made to him prior to October, 1934.

Myrtle Jost, the surviving widow and the Administratrix of the Estate of Joseph J. Jost, testified that she never claimed any interest in said stock Certificate No. 6370, and that she understood under the dissolution agreement it was to go to the Appellee William Schmidgall. One Janssen, who had been employed to compile a statement of the condition of the partner-

ship at the time of the dissolution, stated there was no dispute between the partners as to the basis of settlement and was advised that Certificate No. 6370, was to become the property of Schmidgall.

The statements prepared by Heilman for the settlement meeting in October, 1934, show that after May, 1932, fines, penalites, dues and interest were all charged up to the amount due upon the two mortgage loans without crediting the stock certificate with any interest or earnings during the same period of time.

From an examination of all evidence we believe the trial Court was fully warranted in finding that the above items of proof, coupled with the further fact that neither Jost during his lifetime or his Administratrix after his death ever claimed any interest in said Certificate, was sufficient to permit the Appellant to regard said stock as the property of the Appellee, and that if the Defendant Association had any doubt as to its rights in the premises it should have cancelled all three certificates of stock on May 20, 1932, and in some manner kept the \$1,273.70, intact until the controversy between the Appellee and the Jost Estate were finally determined, or filed an interpleader proceeding to determine the ownership of the said balance. In our opinion all of the corroborative facts and justifiable inferences support the statements of the Appellee concerning the request for the cancellation of the certificate in May, 1932.

It is urged by the Appellant Association that even though Appellee was the unqualified and absolute owner of the certificate, he would not have been entitled to receive the withdrawal value at any time prior to October 1934, because of the requirements of the By-Laws of the Association, that withdrawing members should make a written application, and would only be entitled to such proportion of the profits as the Board of Directors may from time to time determine by resolution. Such a provision in the By-Laws, in the absence of any conduct on the part of the officers amounting to a waiver, under the holding in *Domestic Building Assn., v. Jourdain*, 110 Ill. App. 197, would have been necessary on the part of Appellee before bringing a cause of action for an accounting. However, in this case the Appellee dealt directly with the Secretary of Appellant and relied upon his representations. The Certificate was delivered to the Secretary, signed by the Appellee, and left in the custody of said

officer. It is a well established practice and custom in Loan and Homestead Associations to vest the management and control of the business to the Secretary. It is to that officer that all stockholders look for advice and information concerning the amount due and the modus operandi for sale and transfer of stock. In this case the Secretary had misled the Appellee into thinking that the Certificate had never been indorsed by Jost. No question of notice or the necessity of filing a written application for withdrawal was ever raised by the Secretary. He held the certificate for a period of nearly four years, for nearly three years after the death of Jost, and for two and one-half years after appellee had requested the withdrawal and concellation and the adjustment of the amounts due on the two mortgages. When he appeared at the settlement meeting on October 1934, with a statement showing that Appellee was in debt to the Association the time had arrived for Appellee to start his suit. The actions and conduct of the Secretary, as the agent of the Association, were sufficient to waive the requirements of the By-Laws. Where notice of withdrawal of stock in a Loan and Homestead Association if given to the Secretary, the proper person to receive it, and he makes no objection thereto, and does not inform the person giving notice that the transfer of the stock in the Association must be entered on the corporate books, such objection cannot afterwards be made. *Prairie State Loan Ass'n. v. Gorrie*, 167 Ill. 414. Thompson on Building and Loan Associations, Sec. 145, page 280.

It was shown in the proof that the Appellant had paid out the sum of \$171.02, for paving assessments due on the two pieces of real estate, and the Court properly allowed credit for such payments, leaving the net amount due the Appellee the sum of \$1,102.68, exclusive of interest, which in our opinion was just and equitable, and supported by the evidence in said cause.

For the reasons discussed and expressed herein the decree of the Circuit Court is hereby affirmed.

Affirmed.

(Seven pages in Original Opinion.)

Published in Abstract

Bernice Walker, as Administratrix of the Estate of
Orrin D. Walker, Deceased, Appellant,
v.
R. L. Brandon, Appellee.

Appeal from Circuit Court of Vermilion County.

OCTOBER TERM, A. D. 1938

Gen. No. 9083

Agenda No. 12

MR. PRESIDING JUSTICE RIESS delivered the opinion of the Court.

Appellant, Bernice Walker, as administratrix of the estate of Orrin D. Walker, deceased, brought suit for damages in the Circuit Court of Vermilion County for the benefit of the next of kin of said deceased, who lost his life as the result of a collision between his automobile and the automobile of defendant, R. L. Brandon. Upon trial by jury, a verdict was returned in favor of the defendant and judgment was entered in bar of suit, from which judgment the plaintiff has appealed herein.

The original complaint and additional counts thereof, in varying language, charged the defendant with general negligence; failure to keep his car under control; failure to keep reasonable look-out ahead; driving at a speed that was greater than was reasonable and proper having regard for the traffic and use of the way, so as to endanger the life and injure and kill the plaintiff's intestate; failure to stop or turn to the right or to do anything to prevent the accident; a failure to discover that decedent's automobile was the first at the crossing where the collision occurred and with wilfully and wantonly driving his automobile into the right side of the intestate decedent's car.

The answer denied that the defendant was guilty of negligence or that plaintiff's intestate was in the exercise of due care as alleged in all counts.

A counter claim was filed by defendant Brandon in which he also sought damages in the amount of \$10,000. The sole count charging wilful and wanton misconduct was withdrawn from the consideration of the jury by the Trial Court. The verdict on the counter claim and the action of the Trial Court in withdrawing the

298 I.A. 630

count charging wilful and wanton misconduct will not be reviewed, as no errors were assigned thereon.

It appears from the evidence that on the morning of October 28, 1936, Orrin D. Walker was driving a Chevrolet coupe in a southerly direction over a gravel public highway east of Fairmont, Illinois, at a point where it intersects a state-paved public highway extending east and west between Homer and Catlin, Illinois, which gravel highway "jogs" to the left about eighteen feet at the point of crossing. Defendant R. L. Brandon was driving a Ford V-8 automobile east on said paved highway, approaching the gravel highway on which Orrin D. Walker was driving. There were no eyewitnesses to the collision. It was established by the plaintiff that the deceased was habitually a careful and prudent driver, possessed of all his natural faculties, 38 years of age, robust and healthy, managed a farming implement business owned by his father, and lived with his parents and sister at their home near Rankin, Illinois, which was north of the place of the accident. He was last seen alive while traveling on the gravel road toward the south, about a mile and a half from the point of the collision, at a speed of 30 to 35 miles per hour. The photographs of his automobile show that it was struck at an angle on the right side, immediately behind the right front wheel. No witness testified at what rate of speed the Walker car approached, entered upon or was proceeding over said crossing when the collision occurred, and there was no evidence as to whether he did or did not stop at the stop sign on the north side of the highway.

Witness Watkins, who saw the Walker car a few days after the collision, testified that it was locked in second gear. Hubert Lovin, Deputy Coroner, testified that the gear was in a forward position and that he did not know what gear it was in. Orland Taylor testified that immediately after the collision, the Walker car was in second gear. Witness Jenkins, a mechanic who towed the Walker car to a garage, testified that the gear shift was not in second gear, and that the nature of the damage to the Walker car caused the transmission housing to be broken and shoved forward, which would result in moving the gear shift lever forward, toward the dashboard.

The Walker car was found approximately 100 feet from the point of the collision, and was headed in a southeasterly direction. It was partly through a fence and against a fence post. The car of defendant Bran-

don was on the south side of the pavement, headed in a northwesterly direction, and the highway showed marks of tires having slid a distance of between 35 and 40 feet from the point of collision.

When the defendant Brandon was seen by plaintiff's witness Taylor prior to the collision, his automobile was between one and a quarter and one and a half miles from the place of the collision. He was traveling east on the paved highway, and according to witness Taylor he was traveling 60 to 65 miles an hour and blew his horn as he passed Taylor's truck.

R. B. Bryson, a witness for the defendant, testified that he saw the Brandon car at a point on the highway about one-half mile from the scene of the collision immediately prior to the time of the accident; that he, Bryson, was 300 or 400 feet from the highway on which Brandon was traveling; that he drove 300 or 400 feet to this highway at a speed of between 30 to 35 miles per hour, stopped, shifted gears and drove on the highway in the same direction which Brandon was going; that he was 600 or 700 feet from the intersection at the time the collision occurred; that he immediately increased his speed and was the first person to arrive at the scene of the accident thereafter. The testimony of this witness, who was the only person near the scene of the accident except the defendant, who could not testify, would indicate that the speed of the defendant's car was much less than 60 to 65 miles per hour. Appellant's counsel (page 11, motion for rehearing), states as follows: "There was evidence that the Brandon car approached the crossing at a speed of 60 to 65 miles an hour, according to the witness Taylor and from 30 to 35 miles an hour according to the witness Bryson." Witness Bryson testified (Abst. p. 62): I was probably 5 or 6 or 700 feet west of where the accident occurred and I saw the crash but I didn't see Mr. Walker's car.

Plaintiff's Exhibit 2, the photograph of the Walker car, shows that it was struck at an angle between the right front headlight and the door. Exhibit 3 shows that the left front part of the defendant's car struck the Walker car. The marks on the pavement, as testified to by plaintiff's witness Woodward, started on the north side of the paved slab and curved in a southeasterly direction over toward where the Walker car was found after the collision, indicating that it was struck while it was still north of the center line of the paved portion of the highway.

It was stipulated in evidence that the photographs of the damaged cars and of the intersecting highways and surroundings offered in evidence by the plaintiff be admitted as correct representations thereof, immediately following the time of the accident; that the east and west highway upon which Brandon was traveling was a durable hard-surfaced road under the jurisdiction of the Department of Highways of the State of Illinois and given preference to traffic upon said east and west highway and so designated as a through highway; that the Department "has erected proper stop signs as required by law along such east and west highway requiring traffic traveling upon intersecting roads to stop before entering such east and west highway;" "that proper stop signs as required by law were so erected at the scene of the accident herein described" and so existed at the time of the accident; that they were so placed to face in the direction from which traffic upon the intersecting north and south road would approach said east and west highway, requiring persons to stop before entering thereon.

From the meager proof of facts or circumstances as to what actually did or did not occur, both the plaintiff and defendant make opposite deductions and inferences. The plaintiff assumes that the evidence conclusively shows that the decedent's car was in second gear at the time of the accident; that this fact, if it were a fact, together with the alleged relative speed of the cars, the point of impact and location of the cars after the collision, taken in connection with the testimony of a number of witnesses who testified that the deceased was a man of careful and prudent habits, tended to prove that the deceased approached the crossing as he was legally obliged to do and then started over the crossing prior to the time defendant's car arrived.

Defendant contends from the testimony of the garage mechanic, who moved the car, that the gear shift was set in high; that the tire marks on the slab, the point of impact and condition of both cars as shown in photographs and the clear and open view of the slab in the direction from which defendant was coming; the fact that plaintiff came from the left side, passed the stop sign and on to the state highway were circumstances tending to show contributory negligence and lack of due care on the part of the plaintiff.

Opposite contentions are also made by the parties from the testimony of witnesses and surrounding circumstances as to the relative speed of the cars. In the

absence of eyewitnesses, all of these facts and circumstances were submitted as questions of fact to be considered and determined by the jury. It was peculiarly within their province to pass upon the probative value of the surrounding facts and circumstances shown in the evidence, together with the credibility of all witnesses testifying therein. Upon the issues of fact, the jury found in favor of the defendants under both the original and counter claims herein. Upon the allegations and issues of due care and contributory negligence, they thereby found the issues against the plaintiff-appellant in the original complaint, and judgment followed from which this appeal was taken.

We have not discussed all of the facts and circumstances offered in evidence, but after considering all of the evidence, we cannot say, as a matter of law, that the verdict was contrary to the manifest weight of the evidence, but are of the opinion that it was in accordance with the greater weight of the evidence.

Complaint is made of a number of instructions given for the defendant. By instruction No. 1 the jury was told in the wording of the statute that motor vehicles traveling on public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left. The instruction further told the jury that "if you believe from the evidence" that the motor vehicle driven by plaintiff's intestate and the defendant approached the intersection at about the same time, then it became and was the duty of plaintiff's intestate to yield the right of way at such intersection to the defendant, and to so operate and manage his motor vehicle that the motor vehicle driven by the defendant would have an opportunity to safely pass through said intersection before the motor vehicle of plaintiff's intestate entered said intersection.

In considering the effect of the statute quoted in the above instruction, it becomes important to determine when a car is deemed to be "approaching from the right," within the meaning of the statute. This provision has been interpreted and applied by this court under varying facts presented in a number of cases. Under the defendant's theory of the evidence, both automobiles approached the intersection at or about the same time and with the added qualification therein contained that the defendant had the right of way only if the jury believed from the evidence that

the two automobiles arrived at the highway intersection at or about the same time, the instruction, which might be criticised when considered alone, was applicable to the facts when construed in connection with the other given instructions as a series herein, and we do not deem it prejudicial to the plaintiff under the facts in evidence.

Defendant's given instruction No. 2 instructing the jury that, although the defendant was not excused from exercising due care and caution in his own behalf, the defendant had a right to assume that persons approaching the highway on which he was traveling from an intersecting road would observe the law and would stop his motor vehicle before entering upon said highway on which the defendant was traveling, and that he had the right to assume that persons approaching said highway from the left would observe the law and yield to him the right of way through the intersection which the two of them reached, or would reach, at approximately the same time. While this instruction does not ask nor direct a verdict, when standing alone, it might be said to assume that the two automobiles reached the intersection at approximately the same time, but when read in connection with instructions numbers one and three, which constitute a completed series on the same subject, it is not fairly subject to this criticism. It is so preceded by the instruction requiring the jury to "believe from the evidence" and so followed by the qualifying language "that if you believe from the evidence that the two automobiles were approaching the intersection of said highways at approximately the same time." Moreover, instruction number four, given by the plaintiff, plainly told the jury that the fact that the defendant was driving his automobile east on a state-aid highway, and that the decedent approached the same from the intersecting highway on the left would not relieve the defendant from exercising due care and caution in approaching said intersection, hence we are unable to see how the plaintiff suffered any prejudice by giving of this instruction. *Riddle v. Mansager*, 254 Ill. App. 68; *Schoenbacher v. Kadetsky*, 290 Ill. App. 28, 7 N. E. (2d) 768; *Geschwindner v. Comer*, 222 Ill. App. 417; *Johnson v. Duke*, 247 Ill. App. 372; *Van Meter v. Gurney*, 240 Ill. App. 165.

In the case of *Riddle v. Mansager*, *supra*, in which Mr. Justice Jones delivered the opinion of the Court, in passing upon the application of the above statutory

provision, it is recognized that the right of way of a vehicle approaching an intersection upon the right does not authorize the assertion of the right of way regardless of circumstances, distance or speed of the respective cars, but negatives the suggestion that the driver who first entered the intersection had the right of way. It is there said (73) that "The driver approaching from the right has the right of way over one approaching from the left, unless the car on the right is sufficiently far away, so that if being driven with due care, it will not reach the intersection until the car from the left can pass. (*Heidler Hardwood Lumber Co. v. Wilson & Bennett Mfg. Co., supra.*) Any other interpretation of the statute would encourage racing to the intersection. It is the purpose of the law to give the driver on the right a preference in passing through the intersection and it is the duty of the driver on the left to respect that right in accordance with the rule herein laid down. A driver on the left owes a duty to the driver on his right to approach an intersection with sufficient care to permit the latter to exercise his right of way. (*Johnson v. Duke*, 247 Ill. App. 372; *Zapf v. Kuttan*, 229 Ill. App. 406, *McCarthy v. Fadin*, 236 Ill. App. 300; *Fisher v. Johnson*, 238 Ill. App. 25.) While the right of way does not relieve the one entitled to it from the duty of exercising due care to avoid injuring another, he may assume that persons approaching the intersection on his left will observe the law and respect his right."

In *McCarthy v. Fadin*, 236 Ill. App. 300 (303, the Court said: "Even if defendant was running at an unreasonable rate of speed, this would not relieve plaintiff from observing the rule of the right of way; for if the accident is caused by the wrong of both parties neither can recover damages from the other."

In the instant case it will also be noted that it was stipulated into the record by both parties that the highway along which Brandon was traveling eastward was a durable hard-surfaced road under the jurisdiction of the State Department of Highways; that the Department "has erected proper stop signs as required by law along such east and west highway requiring traffic traveling upon intersecting roads to stop before entering such east and west highway" and "that proper stop signs as required by law were so erected at the scene of the accident herein described." The photographs admitted in evidence and stipulated to be correct show the crossing in question, show the jog to the

left in the gravel highway on which Walker was traveling southward, show the stop sign and State highway referred to and that the view of the parties was unobstructed in all directions.

Instructions constituting a series on the same subject should be construed together, and when so construed, constitute a complete statement of the principles of law applicable to defendant's theory of the proofs and evidence herein. *River Park Dist. v. Brand*, 327 Ill. 294, 158 N. E. 687; *People's Nat. Bank of Monmouth v. Fernald*, 252 Ill. App. 5.

Defendant's instruction number five told the jury that evidence had been admitted to the effect that on other occasions witnesses had been with the plaintiff's intestate, and that in their opinion on such occasions, the plaintiff's intestate was careful.

The jury was further instructed that notwithstanding such evidence, the ultimate question as to due care of plaintiff's intestate for the jury to determine was whether or not the plaintiff used due care for his own safety at the time of his injury. And the jury was told that if the evidence failed to show that plaintiff's intestate was using due care and caution for his own safety on the occasion in question, it would then be immaterial how careful the plaintiff's intestate might have been on other occasions. Plaintiff's given instructions, two, three and five fully covered the same principles and their application to the evidence therein.

Where there are no eye witnesses to the injury, habits of the deceased as to care and prudence may be shown; however, the jury should also consider the surrounding facts and circumstances at the time of the injury, as the same appears in the evidence, in determining whether or not the deceased was careful or negligent at the time he was killed. Due care or want of care may be shown by circumstantial evidence. *Petro v. Hines*, 299 Ill. 236, 132 N. E. 462.

In view of the fact that the plaintiff had offered the evidence of 17 witnesses, who testified that the decedent was habitually a careful and prudent driver, in addition to the instructions given for plaintiff in relation thereto, the defendant was entitled to this instruction, and we find no harmful error therein.

We cannot agree with appellant in her objections to appellee's instructions numbered 7, 8, 9, 10, 11 and 12 as being prejudicial under the evidence. Instruction No. 12 tells the jury that in arriving at their verdict, they must be guided by the evidence, facts and circum-

stances presented to them from the witness stand, and on that, and that alone, arrive at their verdict. Appellant objects to the form of this instruction because there were no eye witnesses to the collision. This instruction correctly stated the law, and it was not error to give this instruction.

Instruction Nos. 7 and 8 are general instructions on due care on the part of plaintiff's intestate and are not prejudicial under the facts herein. Defendant's instruction No. 9 tells the jury that before the plaintiff can recover, she must prove by the preponderance of the evidence that plaintiff's intestate was in the exercise of due care and caution for his own safety, at and just before the time of the accident, and that the defendant was guilty of negligence, which was the proximate cause of the accident. Instruction No. 10 states the issues involved in the suit.

In the case of *McMahan v. Daugherty*, Gen. No. 9078, recently decided by this Court, involving a collision at an intersecting crossing of two streets in the City of Danville, certain instructions were held to be erroneous, in addition to which other errors appeared in the record, and the testimony of eye witnesses was highly conflicting, hence we held the record therein to contain reversible error. Under the meager proof and varying facts in the instant case wherein we deem the verdict of the jury to have been in accordance with the manifest weight of the evidence, we cannot hold that the instructions herein, when considered as a series, constituted reversible or prejudicial error.

If substantial justice has been done between the parties by the verdict, the Court will not ordinarily reverse for errors in the instructions when the Court is of the opinion that the instructions complained of did not affect the verdict and no other substantial error appears in the record. *Sweeny v. Northwestern Mutual Life Ins. Co.*, 251 Ill. App. 1 (31); *Ford v. Ford*, 257 Ill. 341, 100 N. E. 915; *Pridmore v. C. R. I. & P. R. R. Co.*, 275 Ill. 386 (394), 114 N. E. 176, *Grosh v. Acom*, 325 Ill. 474 (494), 156 N. E. 485; *People v. Storer*, 329 Ill. 536 (542), 161 N. E. 76; *Wilson v. C. & W. I. R. Co.*, 365 Ill. 405, 6 N. E. (2d) 634.

In the case of *People v. Storer*, *supra*, it is said that "The object of the review of judgments of trial courts by courts of appellate jurisdiction is not to determine whether the record is free from error but to ascertain whether a just conclusion has been reached, founded upon competent and sufficient evidence, in a trial in

which no error has occurred which might be prejudicial to the defendant's rights." *People v. Stover*, 317 Ill. 191, 148 N. E. 67, *Sweeny v. Northwestern, Mutual Life Ins. Co.*, *supra*; *Wilson v. C. & W. I. R. Co.*, *supra*.

"Errors in instructions are not prejudicial where, considering the instructions as a series, the jury are properly informed as to the law applicable to the case." *Reivitz v. Chicago Rapid Transit Co.*, 327 Ill. 207, 158 N. E. 380; *People v. Storer*, *supra*. Jurors will ordinarily be presumed to understand and apply the language of instructions in the sense "that ordinary men and jurors" would understand and apply such language under the evidence and circumstances in evidence before them at the trial and not in the hypercritical sense that counsel might, at leisure, construe it. *Graham v. Dressen*, 292 Ill. App. 15 (27), 10 N. E. (2d) 843; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166.

It is the opinion of this Court, as herein modified upon a rehearing of the cause granted on plaintiff's petition, that no reversible error appears in the record, and the judgment of the Circuit Court of Vermilion County is therefore affirmed.

Judgment Affirmed.

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inion filed Jan 24 1938

PUBLISHED IN ABSTRACT

L. B. Strayer, Administrator, etc., deceased, R. D. Ward, Administrator de bonis non of Estate of Sarah Hefner, deceased, Complainants-Appe llants, v. John F. Shepard, The Normal State Bank, Defendants Appellees.

Appeal from Circuit Court of McLean County.

JANUARY TERM, A. D., 1938.

298 I.A. 630²

Gen. No. 9112

Agenda No. 18

MR. PRESIDING JUSTICE RIESS delivered the opinion of the Court.

A bill in chancery was filed in the Circuit Court of McLean County by the administrator of the estate of Sarah Hefner, deceased, which was heard and dismissed for want of equity and the cause was brought to this Court on appeal by the administrator de bonis non of said estate. The bill was filed on June 5, 1929, and as finally amended, charged that among the assets of the estate of Sarah Hefner, deceased, the Complainant found three promissory notes dated March 1, 1925, for \$2000 each, due March 1, 1930, signed by Lewis C. Wheaton and Minnie A. Wheaton, payable to bearer, which notes were secured by a trust deed to John F. Shepard, Trustee, one of the defendants-appellees herein.

The bill avers that no interest was paid on the above notes since March 1, 1928, and that upon investigation by the complainant, it was found that the notes in question were secured by a trust deed to said Trustee for \$8000 dated March 1, 1925, conveying to said Trustee 160 acres of land in DeWitt County and 140 acres of land in McLean County, Illinois, and that said trust deed was recorded in the Recorder's Office of DeWitt County, Illinois.

It is further averred in substance that there were also three prior trust deeds of record: One to John F. Shepard for \$5000 recorded in DeWitt County; one to John F. Shepard, Trustee, covering the DeWitt County land, in the sum of \$24,000, and one to John J. Morrissey, dated March 27, 1922, to secure notes in the amount of \$7000 covering the land in McLean County, and that none of these trust deeds had been released of record.

After alleging that the value of all lands described in the trust deeds did not exceed the sum of \$22,000, the bill further averred that the defendant Shepard and the Normal State Bank had been Mrs. Hefner's confidential advisers and occupied fiduciary relations in the handling of her money; that Shepard had full knowledge of all prior mortgage liens on the land on which Mrs. Hefner's notes were secured by second and third mortgage liens; that this sum of \$6000 was invested for and on behalf of Sarah Hefner in the notes above described, and that she was led through fraudulent and false representations to believe that the notes were secured by first mortgage liens on farm lands and to invest her money therein, and asked for an accounting and restitution by defendants. Numerous amendments were made either upon demurrer sustained or by leave of Court during the course of the proceedings, several of which were later withdrawn, and to the bill as finally amended, a demurrer was overruled and answers were filed by the defendants denying the existence of fiduciary relations between the parties, denying all allegations of fraud and deceit, pleading laches on the part of plaintiff (Abst. 22) and denying all right to equitable relief. The cause was referred to the Master in Chancery, who found the issues in favor of the complainant, and against the defendant Shepard, but exonerated the co-defendant, Normal State Bank, from participation in the alleged transactions. The report recommended a decree in favor of the plaintiff and against defendant Shepard for \$6000 and six per cent interest from the date of payment of the Dixon loan, which was in March, 1924.

Upon a hearing of numerous objections to the Master's report, standing as exceptions, the Chancellor sustained the exceptions and dismissed complainant's bill for want of equity, whereupon this appeal followed. No errors have been assigned on the ruling of the Trial Court with reference to the decree as affecting the Normal State Bank.

It appears that in 1916, Mrs. Hefner was living in the village of Lexington, Illinois, and that she and her daughter, Mrs. Flesher, were desirous of making certain investments of private funds in mortgage securities. The question came up between them as to investing \$6500 belonging to Mrs. Hefner and certain funds of Mrs. Flesher. At that time and subsequent thereto, a Mr. Bishop, who was a son-in-law of Mrs. Hefner and who had married a sister of Mrs. Flesher,

lived near Lexington, Illinois, and was a director of the Normal, Illinois, defendant bank, of which the defendant Shepard was then cashier. Mr. Bishop stated in substance that he would see if Mr. Shepard had anything suitable in the way of first mortgages. Bishop took it up with Shepard and the result was that a first mortgage loan for \$6500 was procured for Mrs. Hefner on the Dixon farm.

It appears that Mrs. Flesher did the talking and as she testified, "transacted the business" for Mrs. Hefner, her mother, in connection therewith. Bishop testified that he had transacted the business for Mrs. Hefner at the time, and that Mrs. Stella Flesher delivered the money to Mr. Shepard; that Shepard handed him \$25 as commission for selling the loan.

It next appears that in the early part of the year 1920, Stella Flesher again visited the bank concerning renewal or placing of loans; that she had a conversation with Shepard about the Dixon and Wheaton loans in the bank at Normal; that she wanted a loan that would pay 6 or 6½ per cent if she could get it (Abst. 64); that she was told that a new Wheaton loan drew 6½ per cent. She testified that "I had a conversation with Mr. Shepard about the Dixon loan. The Wheaton loan. It was about 1920. In the bank at Normal. The early part of the year, so we could transact business the first of March. I inquired about these loans. He told me this was the Wheaton loan. I don't remember whether he told me of any other loans or not. He spoke of the specified one. I don't remember he spoke of others. He told me what interest we were to get. I wanted all I could get. I expect I said 6 or 6½ per cent. I suppose I did say I wanted 6½. Anybody would have. I am not sure that he said the Wheaton loan drew 6½ per cent."

Shepard testified that he told her it was a second mortgage, but she claimed that he told her it was a first mortgage lien. The papers were delivered and she stated that she saw the notes and mortgages and read over the notes about three times after she went home and that her mother had also examined them. (Abst. 65; Record 154 to 156) Shepard testified that he discussed as many as a half dozen loans with Mrs. Flesher at the time and that the Wheaton loan was selected by her because it bore the larger rate of interest and Mrs. Hefner and Mrs. Flesher were personally acquainted with Wheaton, who lived in Lexing-

ton, their home town. Mrs. Flesher testified that both the Dixon and Wheaton loans were discussed, but that she did not remember whether other loans had been discussed at the time. It appears that interest was received on these loans through the bank at Normal either by letter or Mrs. Flesher or Mr. Bishop's daughter called for it (Abst. 76), but that all their banking business aside from the loans in question was done elsewhere by Mrs. Hefner and Mrs. Flesher. Mrs. Hefner never called at the bank. At that time (1920), Shepard delivered to Mrs. Flesher \$3000 in second mortgage notes on the Wheaton McLean County lands subject to a prior trust deed of \$7000 to Morrissey, which was renewed in 1922.

Early in 1924, the question of renewal of loans to Mrs. Hefner and Mrs. Flesher again came up. A conversation was again had at the bank between Mrs. Flesher, who spoke for Mrs. Hefner to Shepard, and some correspondence took place between the parties concerning the loans. From the testimony and exhibits, it appears that on February 6, 1924, a letter was written by Shepard to Mrs. Hefner reading as follows: "I have been waiting to hear from you and your Daughter in regard to whether you wanted to renew the L. C. Wheaton, Mortgage notes. If you do not, it will be alright only I would like to know soon, as I told your Daughter when she was here there is a prior loan of \$7000.00 on the Wheaton land but the way land is selling it would seem that the loan would be safe, but you folks do just what you want to do, as you know the Wheatons better than I do."

Mrs. Flesher disclaimed any recollection of this letter, but a carbon copy, after demand for the original, was offered in evidence by the defendant Shepard, the authenticity and receipt of which was denied by the plaintiff, but partially confirmed by Mrs. Flesher on cross examination (Abst. 69, 70).

On February 9, 1924, a letter was written to Shepard by Mrs. Flesher from Lexington, Illinois, saying: "Your letter just received, will say Mother and I both would like to make the same loan under the same conditions for 3 years only, with the rate of $6\frac{1}{2}\%$. We thank you in advance for your time and kindness in attending to this business for us."

On March 6, 1924, Shepard wrote to Mrs. Stella Flesher at Lexington as follows: "Mr. Dixon finally made other arrangements about his loan, but all the better for your Mother, I am giving her \$6500.00 in

the Wheaton loan which draws $6\frac{1}{2}$ while it is only for one year, by that time there will be something else to take its place. So I am enclosing \$6500.00 for your Mother, and \$3000.00 for you which I trust will be satisfactory to you both. Would appreciate a word from you as to your Mother being satisfied the way that I have arranged it for you. Also you will find check to your Mother for \$422.50 for the W. H. Dixon interest and a check to you for \$195.00 in payment of the L. C. Wheaton, interest." No reply was made, but the notes were retained and subsequent interest collected thereon. Six thousand dollars were in Wheaton notes and five hundred dollars in a Farmer note, which latter note was subsequently paid. The \$6000 in Wheaton notes were subsequently exchanged for the three \$2000 notes dated March 1, 1925, bearing $5\frac{1}{2}\%$ interest, described in the complaint and upon which interest was thereafter paid to March 1, 1927.

Concerning the above renewal of loan, Shepard testified upon "direct examination" by plaintiff (Abst. 75) that "The conversation at the cashier's window was just prior to March 1, 1925. She said that her mother and she were wanting more interest. We had changed this \$6,000.00 note that was drawing $6\frac{1}{2}$ per cent to $5\frac{1}{2}$ per cent and she said that they were anxious to get more interest, but they could not locate anything that was satisfactory. I said to her that 'this mortgage is a second mortgage. There is a \$7,000.00 first, but I think the land is worth more than that. You know what land is, you know the Wheatons,' and she said 'Yes.' " On "cross-examination" by defendant (Abst. 83) he further testified that "The rate of interest on the \$8,000.00 loan was cut down to $5\frac{1}{2}$ per cent. Mrs. Flesher objected to the rate of interest being cut down and tried to get other loans. I told her she could take it or leave it alone, and if she didn't want it she could have her money. She took it at $5\frac{1}{2}$ per cent. That conversation was at the cashier's window. The increase of the mortgage on the DeWitt County land from \$20,000.00 to \$24,000.00 took up the original \$5,000.00 second. He let it sell for taxes a couple of years and I had to redeem it. That was the reason the loan was increased." Concerning this alleged conversation, Mrs. Flesher was not interrogated and did not testify.

It may be noted that the defendant Shepard was called and examined as a factual witness by the plaintiff (Abst. 71, Record 182) and was cross examined

by the defendant (Abst. 81) and on redirect examination by the plaintiff (Abst. 84 to 88) without objection by either party. No reference was made to his being called for cross examination by plaintiff under Section 60 of the Civil Practice Act (Ch. 110, Par. 184, Ill. Rev. Stat. 1937). While the plaintiff was not bound by his testimony, the same must, in any event, in so far as it is not rebutted as is permitted under the above section, be considered and weighed in the same manner as other testimony in the cause. *Crowder v. Nutall*, 285 Ill. App. 254, 1 N. E. (2d) 912.

It appears that in 1925 the McLean County lands were held subject to a \$7000 unpaid deed of trust given to one Morrissey, as Trustee, dated March 27, 1922, and that the mortgage on the DeWitt County lands was held subject to a \$24,000 mortgage dated March 1, 1925, but that the alleged \$5000 first mortgage on the DeWitt County land had been paid and the notes cancelled, although the mortgage had not been released of record. The \$8000 mortgage date March 1, 1925, of which loan Mrs. Hefner held three \$2000 notes, was a blanket second mortgage lien on the lands in both counties. At the time of these transactions, Mrs. Hefner was aged between sixty and seventy years; Mr. Bishop was aged seventy when he testified in 1933 and Mr. Shepard was aged seventy-five years in October of that year.

Upon the hearing before the Special Master, rulings of the Master on admission of testimony for the plaintiff in permitting counsel to pursue a course of examination by narrative statements, suggestions and recitals, which, in a number of instances, called for assent and to which repeated objections were offered, most of which were overruled by the Master, was prejudicial. In the cross examination of these witnesses by counsel for the defendant, objections were frequently made that the cross examination was unduly restricted and prejudicial to the defendant's interests. The objections to the restricted cross examination with transcript of the evidence was taken before the Chancellor, who appears to have read the entire testimony and pleadings, and in a written opinion (not certified to this Court) sustained defendant's objections and properly ruled that a broader examination of witnesses, including Mrs. Flesher, should be permitted. Much repetition and argument appears in the findings of the Master.

The letter of Shepard to Mrs. Hefner recommending the Wheaton loan, when considered alone, would indicate that Defendant, without stating the fact that it was a second mortgage, recommended it to her as being better for her purposes than the Dixon loan which was no longer available. However, when all the letters are taken together, including the previous letter in which Shepard notified her of the \$7000 prior lien and left it entirely up to her whether she desired to take the loan, but requested a specific answer thereto, tended to corroborate defendant's oral testimony, and together with the fact that the original transaction had been made through and on the recommendation of Bishop, a bank director and son-in-law of Mrs. Hefner, and that the Wheaton mortgages were part of a renewal and increase of previous loans, in all of which transactions we find that Mrs. Flesher continued to act for and as agent of her mother, we believe that plaintiff did not prove the allegation that the defendant was acting in a fiduciary or trust capacity at the time the purchase or exchange of securities were made, nor that he was guilty of any fraudulent concealment in relation thereto. All of the mortgages appeared upon and were matters of public record. Defendant received no compensation as agent or otherwise from Mrs. Hefner in any of the transactions in question. We find that the lower Court did not err in finding from the evidence that no fiduciary relationship existed between the parties.

Plaintiff offered certain statements of officers of another bank, since closed, to which Mrs. Flesher seems to have taken \$3000 notes of the 1920 issue owned by her for use as collateral security, and wherein these parties called up Shepard and inquired whether the Wheaton notes were on first mortgages and say they were told that they were. It must be noted, aside from the testimony of Shepard and the letters in evidence concerning the 1924 and 1925 loans and certain admissions of Mrs. Flesher, that the Master repeatedly sustained objections by plaintiff to going into the facts in connection with this loan as concerned her paper upon cross examination of Mrs. Flesher. Other testimony was offered by the parties, which we cannot fully set forth nor discuss herein.

Some testimony was offered as to the fair cash market value of the Wheaton land in DeWitt County in 1925, in which plaintiff's witnesses placed it at \$80 per acre, but none as to the value of McLean County

lands, all of which was placed by defendant at \$150 to \$160 per acre. There was 160 acres in DeWitt County upon which a \$24,000 mortgage loan was made and 140 acres of it was in McLean County upon which the smaller \$7000 loan was made. The value of the land in question, as did the value of all farm lands, shrank very materially after this loan was made. The bona fides of the transactions must be considered as of the date when the transactions were entered into and made and not in the light of land values as they turned out to be after the depression in land values had taken place.

The amended bill of complaint seeks an accounting and recovery of the six thousand dollars advanced by Mrs. Hefner and interest thereon, and although the complainant asked for an accounting, it is evident from the bill itself, in the absence of adequate proof of a fiduciary relationship between the parties which would give a Court of equity jurisdiction of the cause, no accounting was necessary to determine the amount due the complainant under the allegations of the bill. On filing a bill to enforce a purely legal demand, unless some special and substantial ground of equitable jurisdiction is alleged and proven upon hearing; such as the existence of a lien for a money demand which cannot be adequately enforced at law or that discovery is necessary to a recovery, or other like equitable considerations affecting the adequacy of the remedy at law, courts of equity will decline to interfere. *County of Cook v. Davis*, 143 Ill. 151, 32 N. E. 176; *Fuller v. Davis' Sons*, 184 Ill. 505, 56 N. E. 791; *Wagner v. Maxey*, 206 Ill. App. 452.

The amount alleged to be due from the defendant Shepard to the complainant was known, as shown by the allegations of the bill. We find that there was no necessity disclosed by the evidence which would require the intervention of a court of equity. The relief sought was for a monetary decree and the remedy at law, under the circumstances, was as complete and adequate as any remedy which a court of equity could give. *Johnston v. Shockey*, 335 Ill. 363; 167 N. E. 54; *Skrodzki v. Sherman State Bank*, 261 Ill. App. 16; *Arnold v. Dodson*, 272 Ill. 377, 112 N. E. 70.

A jury trial was the right of either party to determine the questions of fact involved. (*County of Cook v. Davis*, *supra*; *Turnes v. Brenckle*, 249 Ill. 394, 94 N. E. 495.) In such situation, unless some special ground of equitable jurisdiction be alleged and proven,

the parties will be relegated to their remedy at law and equity will not interfere. As said in *Wagner v. Maxey*, *supra*, courts of equity do not sit for the purpose of entertaining bills, the object of which is to recover damages.

In cases of concurrent jurisdiction in courts of law and equity, the fact that the legal remedy is not full, adequate and complete is the real foundation of equitable jurisdiction. *Shenehon v. Ill. Life Ins. Co.*, 100 Ill. App. 281; *Shorman v. Hurd*, 107 Ill. App. 471.

As stated in *Goldman v. Blanksten*, 240 Ill. App. 136, "there are many cases of fraud where the parties imposed upon have an adequate remedy at law, and there are many where only equity would suffice. The cleavage between the two is frequently difficult to discover." As there is no standard or rule fixed or formulated, the facts in each case must govern the form of redress. *Shorman v. Hurd*, *supra*.

It is further contended by the appellee that complainant was guilty of laches and that his claim, if any, is barred by lapse of time. The general rule seems to be that while in some cases, courts of equity may ignore the Statute of Limitations because it is purely legal as distinguished from an equitable defense, still such action is not taken in any case except one in which equity has exclusive jurisdiction. *Harding v. Durand*, 138 Ill. 515; 28 N. E. 948. The Dixon loan was taken up and the Wheaton notes were mailed to Mrs. Hefner on March 6, 1924. The suit was filed herein on June 5, 1929.

When courts of equity have concurrent jurisdiction with courts of law and the party proceeds in equity, if barred at law, he will be barred in equity. *Hawley v. Simons*, 157 Ill. 218, 41 N. E. 616; *Lancaster v. Springer*, 239 Ill. 472, 88 N. E. 272; *Gordon v. Johnson*, 186 Ill. 18, 57 N. E. 790; *Ohlendorf v. Bennett*, 241 Ill. App. 537.

Upon a rehearing of this cause, we have more fully discussed the evidence and issues herein, but a careful review of the entire record leads us to hold that no reversible error appears therein.

We hold that the Chancellor did not err in dismissing complainant's bill for want of equity, and the decree of the Circuit Court is therefore affirmed.

Decree Affirmed.

act
in ... 1934
PUBLISHED IN ABSTRACT

Emma Krug, Plaintiff-Appellant, v.
Marie Schwarzentraub (Also known
as Mary Schwarzentraub),
Defendant-Appellee.

Appeal from Circuit Court, Tazewell County.

OCTOBER TERM, A. D. 1938

298 I.A. 630³

Gen. No. 9128

Agenda No. 4

MR. PRESIDING JUSTICE RIESS delivered the opinion of the Court.

The plaintiff, Emma Krug, has appealed from an order of the Circuit Court of Tazewell County sustaining a demurrer of defendant Marie Schwarzentraub to plaintiff's amended declaration and from judgment against plaintiff in bar of suit.

The original declaration was filed in August, 1933, and consisted of two counts seeking recovery of damages from three Defendants; two of whom, Dr. Henry L. Yoder and Theodore Schwarzentraub, late husband of defendant Marie Schwarzentraub, have since departed this life. Thereafter, in February, 1937, plaintiff filed her amended declaration against Marie Schwarzentraub, the sole surviving defendant. It alleges that all parties resided in Tazewell County; that plaintiff Emma Krug resided with her mother, Rosa Krug, in the Village of Morton since September 16, 1931; that the three defendants were neighbors and friends of the Krugs and that Theodore Schwarzentraub and his wife, Marie, "had great influence, especially with Rosa Krug, and that many persons in and about the vicinity sought the opinion and direction of the said defendant and her husband," since deceased; that on the 15th of September, 1931, said Theodore and Marie Schwarzentraub, his wife, "exercised improper influence upon Rosa Krug, the mother of plaintiff, and by said influence caused her to file in the County Court of Tazewell County, a certain petition alleging the said Emma Krug to be an insane person and unsafe to be at large and suffering from a mental derangement; praying among other things that a writ issue requiring her to be brought before the Court

at some time to be then and there fixed" and that upon a hearing of said cause the Court make such disposition of said Emma Krug "as is directed by statute;" that said petition was sworn to or affirmed by Rosa Krug and that by written order of the County Judge the petition was set for hearing at Pekin in said County on the 16th day of September, 1931, at 9:00 o'clock A. M., which order directed that a writ issue to the Sheriff, commanding him to bring Emma Krug before said Court for said hearing; that she be givenday's notice in writing of the time and place of said hearing "and that said writ so issued as aforesaid and directed to the Sheriff of Tazewell County, was duly served upon the said Emma Krug, plaintiff, as shown by the return thereof, on the 16th day of September, 1931;" that on said 16th day of September, at 9:00 o'clock A. M., said Sheriff "then and there in the home of her mother, at the said Village of Morton, served upon said plaintiff, the said writ aforesaid and immediately thereupon, to-wit, at 9:00 o'clock A. M.," the County Judge then and there acting, "caused a commission to be issued for an examination of the said Emma Krug, to Henry L. Yoder and Orman Brines," both resident physicians, and that they then and there at the home of Emma Krug returned their report to the interrogatories, but not as to her sanity, upon which report the County Judge, in the presence of plaintiff, ordered a warrant of commitment to be issued, directing said Sheriff to deliver plaintiff to the superintendent of the Jacksonville State Hospital for the Insane, which writ was issued by the Clerk of said Court on said day and executed by the Sheriff, as therein commanded, and plaintiff was taken by said Sheriff to said State Hospital "where she was confined and deprived of her liberty until the 6th day of April, A.D., 1932, when through the influence and at the request of the said defendant and her husband, Theodore Schwarzentraub, she, the plaintiff was released from said institution;" that she was not insane and not found by the Commission to be insane; that plaintiff had no notice or knowledge of the petition nor was notice served upon her as required by the order of said County Court; that she was given no opportunity to prepare her defense and was served at the same time and at the same hour of the hearing therein, and was "deprived of her liberty without due process of law;" that the Court had no jurisdiction under the circumstances and that the order of commitment was

“wholly without right, warrant or authority in law;” that she has been greatly damaged in her reputation, humiliated and has lost large sums of money which she could have earned had she not been so deprived of her liberty; that she has spent large sums of money “in attempting to clear her name of the said charge of insanity and to cause the said records to be expunged,” and that the defendant and her husband, who was then living, well knew that plaintiff was not insane; that said wrongful acts were done and committed by said defendants “with an intent and purpose to injure said plaintiff.”

Defendant Marie Schwarzentraub filed general and special motions to dismiss in the nature of demurrers on October 19, 1937, averring that the amended declaration failed to state a cause of action and praying dismissal thereof and judgment in bar of suit. As special grounds for dismissal, she averred that both counts relate to a “purported influence of Rosa Krug, and it nowhere appears that there was any conspiracy between this defendant and said Rosa Krug, and that the allegations concerning the influence of this defendant over Rosa Krug are pure conclusions of the pleader; said pleading wholly fails to state that this defendant ordered, commanded or had anything to do with said Rosa Krug’s signing said petition, and, therefore, wholly fails affirmatively to connect this defendant with said petition, and is a pure conclusion of the pleader;” that the allegations of both counts concerning petitions, writs, papers and processes of and hearing by the County Court of Tazewell County held in plaintiff’s home pursuant to statute, and allegations in relation thereto are “redundant, ambiguous and wholly insufficient in law to in any manner impose upon this defendant liability for the intervening action and orderly processes of the County Court of Tazewell County,” with which this defendant had no connection; that it affirmatively appears from the face of the declaration that the County Court found Emma Krug to be insane, independent of any act or control by this defendant; that the amended declaration was insufficient in law to be answered unto and asked judgment of dismissal and in bar of action. The motion was sustained; plaintiff elected to stand by her amended declaration, suit was dismissed, and judgment was entered against plaintiff in bar of action and for costs of suit, and the appeal herein followed.

Under the former practice act a general demurrer

lies when the pleading is defective in substance on its face. *Mutual Accident Association v. Tuggle*, 138 Ill. 428, 28 N. E. 1066; *People v. Greer College*, 302 Ill. 538, 135 N. E. 80. Under the present Practice Act (effective January 1, 1934), where a pleading is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein such pleading or division thereof is insufficient. Illinois Revised Statutes, 1937, Ch. 110, Sect. 45, Par. 2; Jones Illinois Stat. Ann. 104.045; *Messick v. Mohr*, 292 Ill. App. 69, 10 N. E. (2d) 870. The motion in the nature of a special demurrer filed herein fully met the requirements of the above statute.

A demurrer or motion to strike in the nature of a demurrer admits material facts well pleaded, but does not admit mere conclusions of the pleader, and a failure to allege facts upon which such conclusions are based, makes the pleading subject to such motion or demurrer. *Ryan v. City of Chicago*, 369 Ill. 59, 15 N. E. (2d) 708; *Marcovitz v. Hergenrether*, 302 Ill. 162, 134 N. E. 85; *American State Bank of Bloomington v. National Life Ins. Co.*, 297 Ill. App. 137, 17 N. E. (2d) 256.

The allegation that the Schwarzentraubs had great influence with Rosa Krug and others in the vicinity and that they "exercised improper influence" on Rosa Krug, the mother of the plaintiff, and caused her to file the petition in question is a mere conclusion of the pleader and sets up no facts or circumstances upon which this conclusion is based. It does not appear specifically what form of civil action, either statutory or at common law, the plaintiff seeks to prosecute against the defendant. It does not plead facts showing malicious motives, want of probable cause and the successful termination of the suit in favor of the plaintiff necessary to state a cause of action for malicious prosecution. *Hocker v. Welte*, 239 Ill. App. 392, *Ruehl Bros. v. Atlas Brewing Co.*, 187 Ill. App. 392; *Brandt v. Brandt*, 286 Ill. App. 151, 3 N. E. (2d) 96.

It does not set up facts that would state a cause of action charging malicious abuse of process, since only conclusions are pleaded, no ulterior purpose or use of the process after its issuance that would constitute an abuse is set forth, and it further appears that process was regularly issued and was used for the purpose for which it was issued. *Ruehl Bros. v. Atlas Brewing Co.*, *supra*; *Bonney v. King*, 201 Ill. 47, 66 N. E. 377;

Merriman v. Merriman, 290 Ill. App. 139, 145; 8 N. E. (2d) 64; *Keithley v. Stevens*, 238 Ill. 199, 87 N. E. 375.

No sufficient facts are alleged that would constitute a conspiracy between the parties, either to do an unlawful act or a lawful act in an unlawful manner. *Bonney v. King*, *supra*; *Brandt v. Brandt*, *supra*.

It does not state a cause of action alleging false imprisonment. The detention was upon a writ duly issued by a Court having jurisdiction of the subject matter upon verified petition of the plaintiff's mother, which writ was duly executed and returned pursuant to its command by an officer authorized to execute process, hearing was held by the Court and order of commitment followed, and no allegations of fact connecting defendant with such procedure as an official or otherwise are set forth.

It is contended by the appellant that insufficient notice was given to the defendant of the hearing to give the Court jurisdiction of her person and that the proceedings in the County Court of Tazewell County, under which she was committed to the Jacksonville State Hospital were therefore void for want of jurisdiction of her person. (*Moats v. Moore*, 199 Ill. App. 270, 275, *e contra*.) We do not deem the above contention pertinent to the issues herein, since the action of the Court was not taken upon the petition of the defendant, but upon the verified petition of Rosa Krug, the mother of the plaintiff, and no facts whatever are alleged from which it may be concluded that the defendant either instituted, prosecuted or was concerned in the action of the Court or its officials during the proceedings referred to or in the use or abuse of any process thereof. These objections were specifically pointed out in the defendant's motion and the Circuit Court of Tazewell County properly dismissed the amended declaration of the plaintiff for failure to state a cause of action.

The ruling of the Court in sustaining the order and entering judgment in bar of suit will therefore be affirmed.

Judgment Affirmed.

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Illinois file 2254757
PUBLISHED IN ABSTRACT

The People of the State of Illinois, Defendant in Error,
v. William McCollum, Plaintiff in Error.

Error to Circuit Court, Vermilion County.

OCTOBER TERM, A. D. 1938

298 I.A. 630⁴

Gen. No. 9141

Agenda No. 1

MR. PRESIDING JUSTICE RIESS delivered the opinion
of the Court.

William McCollum, charged in one count of an indictment with contributing toward the delinquency of one Mildred Miller, was found guilty by a jury, and after motions for a new trial and in arrest of judgment were overruled, was sentenced to imprisonment in the County Jail of Vermilion County for a term of one year and fined \$200.

The record in this case is voluminous and numerous errors are assigned and argued. On the trial, the prosecutrix definitely testified to six dates when she said that she had sexual intercourse with the defendant; that she remembered the dates because she wrote them down in an autograph book which she had.

The defendant testified in his own behalf and denied all the charges made against him by the prosecutrix. He offered a number of witnesses who testified that he was elsewhere on the occasions that the prosecutrix testified that he was with her. Twenty witnesses testified that the defendant's reputation for chastity and virtue was good, which testimony was not controverted by the People. The story of the prosecutrix was uncorroborated in any detail, and if the judgment is to be sustained, the record must be substantially free from prejudicial error.

By the People's first instruction the jury was told that if they "believe from the evidence both that touching the alibi of the defendant and all the other evidence in the case that the defendant is guilty as charged in the indictment, then in such state of the proof, if such be the state of the proof, you should find the defendant guilty."

While every fact is not required to be proven beyond a reasonable doubt in a criminal prosecution, certain facts must be so proven. By this instruction the jury

was told to find the defendant guilty, if they believed from the evidence touching the alibi and all other evidence that he was guilty. The element requiring that the jury find the defendant guilty from the evidence beyond a reasonable doubt, is entirely omitted from the instruction. It is erroneous in other respects and should not have been given. A similar type of directory instruction was held erroneous in *People v. Davis*, 300 Ill. 226, 133 N. E. 320, and in *People v. Lehner*, 335 Ill. 424, 167 N. E. 20.

By the People's third instruction, the jury was told that the defendant had interposed the defense of an alibi, which means that he claims that he was in another place at the time of the commission of the crime charged in the indictment. The jury was further told that the defendant must establish proof that he was in another place at the time of the commission of the crime, but such evidence that taken with all the other evidence in the case you have a reasonable doubt as to his guilt before you will be justified in acquitting him, but if after hearing all other evidence in the case, you have an abiding conviction of the truth of the charge in the indictment, you should find the defendant guilty by your verdict.

The instruction is vicious in that it repeatedly assumes the commission of the crime charged in the indictment. The jury was specifically instructed that the defendant must establish proof that he was in another place at the time of the commission of the crime by such evidence, that taken with all the other evidence in the case, would cause the jury to have a reasonable doubt as to his guilt. The defendant denied his guilt and the theory of the defense was that no offense had been committed.

The instruction also has the vice of substituting "an abiding conviction" for proof beyond a reasonable doubt, the jury could easily have been misled by this instruction into believing that the proof of the charge need not be made beyond all reasonable doubt. The language in this instruction was condemned by the Supreme Court in *People v. Church*, 366 Ill. 149, 7 N. E. (2d) 894.

Except for the direct assertion of the prosecutrix, that the defendant had sexual intercourse with her, and the defendant's equally direct denial, there is no great amount of conflict in the evidence. The defendant was corroborated in his denial by disinterested witnesses who testified to an alibi. If it affirmatively

appeared from the record that all possible evidence had been introduced at the trial, we would pass on the question as to whether or not the defendant had been proven guilty beyond a reasonable doubt.

Defendant appellant further contends that the Court erred in sustaining objections to proof of certain alleged statements by a sister of the prosecutrix while in California and prior to her return to Illinois to the effect that if she ever came back, she would cause the downfall and ruin of defendant's reputation by similar charges of immorality to those alleged to have been made by him against one Lee. This sister, although present, was not a witness at the trial, and proof of the alleged statements was offered to be made by two witnesses from California. No sufficient foundation was laid for the introduction of such statements made by one who was not a witness, nor was any foundation laid by cross examination of the prosecutrix that would make such alleged statements admissible in evidence, either for impeachment purposes or as bearing upon the intent of prosecutrix in making the charges. Under the present state of the record, this testimony was properly excluded.

A long narrative instruction to the jury in relation thereto not based on the evidence was offered by the defendant and properly refused by the Court.

Exceptions were taken to remarks of the State's Attorney in his opening statement, concerning proof of the alleged flight of the defendant, which evidence was held to be inadmissible and excluded by the Court at the hearing, thus rendering such statements improper.

Statements made by counsel as to what he personally knew or thought the facts to be are objectionable. Certain other arguments of the State's Attorney in his closing argument are objected to as not being based upon the evidence or reasonable inferences therefrom. Both counsel went outside of the record in this respect, and this should have been avoided. In the event of a retrial of this cause, all objectionable remarks by counsel should be avoided. Other assignments of error appear, upon which we do not deem it necessary to pass herein.

Reversible and prejudicial error appearing in the record, the cause will be reversed and remanded to the Circuit Court of Vermilion County for further proceeding pursuant to the opinion of the Court herein.

Reversed and Remanded.

PUBLISHED IN ABSTRACT

**R. J. Herrick, Plaintiff-Appellee, v. Litchfield
National Bank, A Corporation,
Defendant-Appellant.**

Appeal from City Court City of Litchfield

OCTOBER TERM, A. D. 1938

298 I.A. 631'

Gen. No. 9152

Agenda No. 22

MR. PRESIDING JUSTICE RIESS, delivered the opinion of the Court.

Defendant, Litchfield National Bank, a corporation, has appealed from a judgment in favor of plaintiff-appellee, R. J. Herrick, in the sum of \$5401.87 entered against said defendant in the City Court of Litchfield, Illinois, upon trial of said cause without a jury.

The amended complaint consists of one count which alleged that on the 16th day of October, 1931, the plaintiff, Herrick, paid to the defendant bank the sum of \$1,000 in cash, and on the same day executed and delivered to said defendant his promissory note for the sum of \$4,000, due six months after date, bearing interest at the rate of six per cent per annum; that said note was renewed and at the maturity date of the renewal, plaintiff paid the full amount of the note with interest to the defendant bank.

Plaintiff further alleged that he received no consideration from the defendant for the execution of the note or for the payment of the money; that he paid the \$5,000 to the bank for accommodation purposes only, because it was represented to him by an officer of the bank that it was in some form of financial difficulty, and it was therefore necessary that the officers of the bank provide and have on hand additional assets in order to assure the financial integrity of the bank and comply with the rules and regulations of the Government Agency which controlled its operation; that execution of the note was so made upon the express promise that the sums of money so advanced and paid by the plaintiff should be repaid to him from the assets of the bank when future financial conditions permitted and when the bank had passed through its time of

financial stringency; that the plaintiff believed such representations and relied upon said statements and paid the sum of \$5,000 to the bank upon said promise and representations of its officials; that the plaintiff held no stock in said bank and derived no benefit nor gain from such transaction; that the officers of the bank fully so understood said transaction; that the plaintiff was not indebted to the bank on any account whatever, and that the defendant, by its officers, repeatedly promised to repay this money to the plaintiff.

The defendant's answer admitted the execution of the note, the receipt of the money and the fact that the plaintiff was not a stockholder of the defendant bank, but alleged that the plaintiff's son, H. B. Herrick, was the owner of 53½ shares of stock in the bank and alleged that if the officers of the bank promised plaintiff to pay him \$5,000, their promise or promises were not authorized by the bank, and that H. B. Herrick, son of the plaintiff and then president of the defendant bank, in his dealings with the plaintiff was the agent of the plaintiff and not the agent of the bank, and that if any money was given to H. B. Herrick, it was for his personal use and not for the use of the bank.

The evidence on the part of the plaintiff shows that on the 16th day of October, 1931, plaintiff's son, H. B. Herrick, who was president of the Litchfield National Bank and lived in Litchfield, Illinois, went to Carlinville, Illinois, to the home of the plaintiff, his father, and stated that he wanted to borrow \$5,000 and that the bank would reimburse him. Plaintiff gave his son a check for \$1,000, payable to the son at that time and subsequently gave a note for \$4,000, payable to the Litchfield National Bank, due six months after date; that said note was later renewed for an additional six months, and then paid by the plaintiff at the renewal date.

The evidence further shows that the son made a notation on a debt and credit slip of R. J. Herrick, donation \$5,000, and on another debit and credit slip a notation, L. W. Cline, \$5,000. No demand was made by the plaintiff Herrick on the bank until sometime in the fall of 1936, after his son was removed from authority in 1933.

Plaintiff testified that at the time he gave the note for \$4,000, his son, who solicited the financial aid for the bank, stated to him that he would be repaid when the bank was able. The cashier of the defendant corp-

oration was shown an exhibit which he identified as the undivided profits account and read an item therefrom dated October 16, 1931, "R. J. Herrick, donation \$5,000". He testified that the exhibit was a regular ledger sheet and part of the record of the bank, and that it had been copied from the debit and credit slips.

L. W. Cline, who is now president of the bank and who was a director on October 16, 1931, testified that H. B. Herrick stated to him at that time that the Bank Examiner had demanded an added reinforcement to the bank's assets of \$10,000.

It clearly appears from the evidence that the \$4,000 note and loan was carried on the records of the bank in the name of R. J. Herrick; that the original transaction was entered on the records of the bank as "R. J. Herrick, donation \$5,000;" that R. J. Herrick had supplied the funds and note that was paid to and went into the assets of the bank.

Under the above circumstances, if the note had not been paid when it became due, the plaintiff could have shown that it was given for accommodation purposes only and successfully pleaded failure of consideration, if suit had been filed. *Litchfield Nat. Bank v. McBride*, 289 Ill. App. 420, 7 N. E. (2d) 348; *Straus v. Citizens State Bank*, 254 Ill. 185, 98 N. E. 245.

The defendant herein received \$5,000 from the plaintiff and received the benefit therefrom, and according to the uncontradicted testimony of the plaintiff, the defendant bank, by its president, agreed to repay the same when the bank was in better financial condition. Although the action of the president of the bank may have been unauthorized in making this agreement, yet it accepted the full benefit of the arrangement through such action and later received the money and thus ratified the transaction; hence we are unable to say that the finding of the Trial Court is against the manifest weight of the evidence.

In the case of *Litchfield Nat. Bank v. McBride*, *Supra*, in which the defendant bank herein had filed suit to recover against the maker of a similar note for accommodation purposes, wherein the bank denied that the note was given without consideration, we said in discussing the facts and issues therein (page 430) that "Appellant insists that even though it be true that appellee was induced to execute and deliver the note because of the promises of Mr. Herrick, the president of the bank, yet the evidence fails to show that

the bank ever made any such promises, that it would never collect the note, nor does it show that the directors ever considered any such proposition."

"The promises were made by Mr. Herrick, the president and duly authorized agent of the bank, and although as such agent he may have been unauthorized to make such promises, yet the bank accepted the note and presented it together with other notes to the National Bank examiner at St. Louis and procured the reopening of the bank, and thereby ratified the acts of its agent."

"A principal who ratifies thereby assumes responsibility for the unauthorized act as it was done, together with its burdens and the instrumentalities used by the agent in doing it, the same as if the principal had authorized the act in the first instance. 2 C.J.S. Agency, sec. 64c."

"A principal cannot avail himself of such acts as are beneficial to him and repudiate such as are detrimental, whether the ratification be express or implied. If a principal elects to ratify any portion of an unauthorized transaction of his agent he must ratify the whole of it; and if he ratifies any part of the transaction, the result is that he ratifies the whole transaction. "Am. Jur. Agency, sec. 223; Am. Law Inst. Restst. of Agency, sec. 96; *Vetesnik v. Magull*, 347 Ill. 611, 180 N. E. 390; *Haas v. Sternbach*, 156 Ill. 44, 41 N. E. 51."

"After having availed itself of the note to induce the National Bank Examiner to permit the bank to reopen for business, appellant cannot now be heard to say that the bank never made any such promises, and neither can it now repudiate that part of the contract which guarantees to appellee that the note was made for the accommodation of appellant and was without consideration and that in consideration of the signing of the note by appellee the bank would make no effort to collect it."

McBride was one of the persons who had similarly given his note to meet the requirements of the Bank Examiner. We hold that the same principles of law that were applied in the McBride case, *supra*, are applicable to and controlling under the facts herein. R. J. Herrick was not a stockholder in the bank and derived no benefit from giving the note to the bank or in advancing the funds in payment thereof, which we hold to have been for accommodation purposes only, and without valuable consideration, and we do not find

that the Trial Court erred in entering judgment for recovery of the funds so advanced by the plaintiff, but hold that such action was in accord with the greater weight of the evidence.

The judgment of the City Court of Litchfield is therefore affirmed.

Judgment Affirmed.

PUBLISHED IN ABSTRACT

**Hollister-Whitney Company, a corporation,
Plaintiff-Appellee, v. American Mutual
Liability Insurance Company,
Defendant-Appellant.**

Appeal from Circuit Court Adams County.

OCTOBER TERM, A. D. 1938

298 I.A. 631²

Gen. No. 9144

Agenda No. 14

MR. JUSTICE FULTON delivered the opinion of the Court.

On January 22nd, 1938, the Hollister-Whitney Company, a corporation, Plaintiff-Appellee, filed suit against the American Mutual Liability Insurance Company, a corporation, Defendant-Appellant upon manufacturer's public liability policy, issued to the Appellee for the period from March 1st, 1932 to March 1st, 1933, for the sum of \$1,093.08, as costs and attorneys fees incurred by Appellee in defending a lawsuit and proceeding which the Appellant refused to defend on behalf of the Appellee.

The judgment of the trial Court was based upon the pleadings and the errors presented on this appeal arise on the pleadings, and in order to properly present the errors the pleadings are set forth quite fully.

The complaint in the instant case alleged the issuance of a policy of insurance by the Appellant and set out the complaint and amended complaint in the suit of the Aetna Life Insurance Company against the Appellee which suit the Appellant herein refused to defend and in which said suit the Appellee incurred costs and attorneys' fees in successfully defending and securing an order of dismissal of the suit as to the Appellee. The complaint in this suit further averred that in and by said policy of insurance the Appellant agreed as respects bodily injury, resulting in death, by a person or persons other than employees of the insured, through accident occurring anywhere, during the policy period as above set forth, by reason of the business carried on by the insured at the location described in the declarations, or by reason of the making of ordinary repair or the renewal of existing mechani-

cal equipment at such locations and as provided in agreement No. 1, of said Policy as follows: To settle or defend each claim and suit even though wholly groundless brought against the insured to enforce the payment of damages for such injury or death; and that by virtue of Endorsement Number 4, which was added to and made a part of said policy under date of March 10, 1932, for the consideration therein expressed which was paid by the Appellee, the said Appellant extended the coverage of said policy to cover the liability of the Appellee for any claims which might be made by any person or persons not employed by the insured on account of bodily injuries or death arising out of any accident or accidents occurring during the terms of said policy on any elevator or elevators erected, constructed or repaired by the insured at any time and caused by defective workmanship or materials used in the construction or repair of such elevators and in which said Endorsement Number 4, it was further agreed that the insurance as respects "defective material and workmanship coverage" is meant to apply to elevator accidents occurring during the policy period but occurring after the work of the insured thereon has been completed but which accidents are alleged to have resulted from the Insured's negligence occurring at any previous time as respects material, workmanship, installation, inspection or repair.

The complaint in the present case further sets forth the institution of the suit by the Aetna Life Insurance Company filed in the Federal Court to which the Appellee was made a party defendant and averred that the Appellee gave the Appellant notice of said proceedings and demanded that Appellant defend the suit but that Appellant refused to undertake the defense or to defend said suit; that Appellee was obliged to defend said suit at its own expense; that Appellee successfully defended said suit in that on June 10, 1937, said suit was dismissed as to the Appellee and no appeal was taken from said order of dismissal and that said order of dismissal became final as to Appellee.

This complaint further alleges that John Bowie, mentioned in the amended complaint in the suit by the Aetna Life Insurance Co., was never an employee of the Appellee; that the Aetna Life Insurance Co., was never an employee of the Appellee nor a contractor or subcontractor, and that the Appellee never had any contractual relations with either the said John Bowie or Aetna Life Insurance Company in regard to

any of the matters contained in the said complaint or amended complaints in the suit by the Aetna Life Insurance Company. It further stated with respect to the suit by the said Aetna Life Insurance Company as follows:

“Plaintiff further states and alleges the fact to be that said complaint and amended complaints so filed in the said District Court of the United States as aforesaid were based upon alleged negligence of Hollister-Whitney Company, a corporation, in that it was alleged that the plaintiff herein used defective materials in the manufacture and construction of said double wrapped traction engine and that the alleged liability of the plaintiff on account thereof is expressly covered by said policy of insurance of the defendant and particularly by Endorsement Number 4 attached thereto, being the ‘defective material endorsement.’ ”

A copy of the Manufacturer’s Public Liability policy issued by the Appellant to the Appellee, the Hollister-Whitney Company, was attached to the complaint in this suit and inasmuch as Appellee’s complaint is based upon Agreement I of the policy and Endorsement No. 4, only such parts of the policy as are material to the errors assigned are set out or stated in substance. At the top of the first page of the policy appears the following:

“Manufacturers Public Liability Policy
AMERICAN MUTUAL
Liability Insurance Company
of Boston
(Herein called the Company)

Hereby Agrees with the insured, named in the declarations attached hereto and made a part hereof and which by the acceptance of this policy the insured warrants to be true, as respects bodily injuries, including resulting death, sustained, except as provided in Agreement V, by a person or persons other than employees of the insured through accidents occurring, anywhere, during the policy period as expressed in item 2 of the declaration, by reason of the business, as described in the declarations, which is carried on by the insured at the locations described in the declarations, or by reason of the making of ordinary repair or the renewal of existing mechanical equipment at such locations, as follows:

Agreement I. To Settle or Defend each claim and

suit, even though wholly groundless, brought against the insured, to enforce the payment of damages for such injury or death, and, as respects such suit, to pay the entire premiums on attachment, removal, and appeal bonds, costs taxed against the insured, and interest accruing on the entire judgment up to the date of payment by the Company of its share of the judgment, and to pay the expenses incurred by the insured for such immediate medical or surgical relief as shall be imperative at the time any such injuries are sustained."

Under the title "Exclusions" in said policy the following appears:

"EXCLUSIONS

AGREEMENT V. This policy shall not cover against any claims for injuries or death.

* * *

- (5) caused, outside of, and away from, the insured's factories, shops, or yards as described in the declarations, through the consumption, or use, by other than the insured or the insured's employees, of goods, products, apparatus, or equipment.

* * *

- (7) as respects the obligation of the insured under any workmen's compensation law, or as respects obligations of others assumed by the insured."

Endorsement No. 4, upon which the main controversy arises is as follows:

"AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

Boston, Mass.

| | |
|-------------------|-----------------------------|
| Risk No. 3762. | "Additional Premium \$..... |
| Endorsement No. 4 | Return " \$..... |

DEFECTIVE MATERIAL ENDORSEMENT

In consideration of an additional premium of \$89.40, based on a rate of \$1.49 for each \$100. of the manufacturing and installation payroll, it is agreed hereby that the policy to which this endorsement is attached is extended to cover the liability of the Insured for any claims which may be made by any person or persons, not employed by the Insured, on account of bodily injuries or death arising out of any accident or accidents occurring during the term of said policy, on any elevator or elevators erected, constructed or repaired by the Insured at any time

and caused by defective workmanship or materials used in the construction or repair of such elevators.

It is further agreed that the insurance as respects 'Defective material and workmanship coverage' is meant to apply to elevator accidents occurring during the policy period but occurring after the work of the insured thereon has been completed but which accidents are alleged to have resulted from the Insured's negligence occurring at any previous time as respects material, workmanship, installation, inspection or repair; and as respects the insurance provided by this second paragraph of this endorsement Section (1), (2), (3), and (5) of agreement V of the policy are not to apply and the limits of liability of the Company for the bodily injury or death of one person shall be Twenty Thousand Dollars (\$20,000) and subject to such limit for each person the Company's total liability for any one accident shall be limited to One Hundred Thousand Dollars (\$100,000).

This endorsement is effective as of date of policy issue and is subject otherwise to all the policy terms, limits and conditions.

Attached to and forms part of M. P. Policy No. 35756 D of the American Mutual Liability Insurance Company of Boston, issued to Hollister-Whitney Company, expiring March 1st, 1933.

Dated at Chicago, Illinois, this 10th day of March 1932."

This complaint prayed judgment in the sum of \$1,039.08, as Attorneys' fees and expense in the defense of said suit by the Aetna Life Insurance Company.

The last amended complaint in the suit by the Aetna Life Insurance Company against the Appellee and others in the suit in the District Court of the United States which is made a part of the complaint in the instant case and was filed September 30, 1935, was an action brought to recover damages for personal injuries to one John Bowie, sustained by him on October 26, 1932, while operating an elevator in the building of his employer Bingham Bros. Company in the City of New York. In that suit the amended complaint alleged that while Bowie was operating said elevator the shaft of the engine broke and as a direct result the elevator car fell to the bottom of the elevator shaft injuring the said John Bowie; that the fall of the elevator car was a direct and proximate result of the neg-

ligence and carelessness of the Hollister-Whitney Company (Appellee here), and that the said John Bowie was in the exercise of due care and caution of his own safety.

The said complaint further alleged that the Aetna Life Insurance Company issued to Bingham Bros. Company, Inc., a compensation policy insuring liability for Workman's Compensation, payable under the New York Workman's Compensation Law which was in force at the time of the accident on October 26, 1932; that the said John Bowie filed a claim for compensation under the New York Compensation Law and accepted certain sums of money which were paid to him under said law; that by virtue of Sec. 29 of said Act the personal injury claim of John Bowie against the Hollister-Whitney Company was assigned to Aetna Life Insurance Company and that said Aetna Life Insurance Company was subrogated to any rights, claims, demands, right or rights of action, which exist or may exist for the benefit of John Bowie against Hollister-Whitney Company on account of said accident and injuries.

The said amended complaint also alleged that the Hollister-Whitney Company was engaged in the business of designing, assembling, manufacturing and building freight and passenger elevators and parts and portions of machines used in and for the erection of elevators and their operation; that their plant was at all times located in the City of Quincy, Illinois; that in August 1927, the said Company entered into a contract with the Sommerville Elevator Company of New York City whereby the Hollister-Whitney Company designed, manufactured and built a double wrapped traction engine to be used on a freight and passenger elevator located in the building where Bingham Bros. and Company had its place of business; that said engine was installed in the shaft of said elevator by said Sommerville Elevator Company; that thereafter in 1929 the shaft of said traction engine broke and the traction engine was returned to the Hollister-Whitney Company; that during the month of January 1930, the Hollister-Whitney Company under a contract with the Sommerville Elevator Company re-built, manufactured and assembled another double wrapped traction engine for use in connection with the same freight and passenger elevator; that when the Hollister-Whitney Company re-built and assembled the second traction engine it installed a new shaft and other new

parts within said engine and then returned it to the Sommerville Elevator Company who installed said engine for use in connection with said elevator; that the Hollister-Whitney Company knew, or by the exercise of due care and diligence, should have known how to properly design and build said traction engine, but wholly disregarding said knowledge, it carelessly assembled said engine in certain particulars specified and set forth in the said amended complaint.

The amended complaint of the Aetna Life Insurance Company, in each of the two counts, demanded judgment against the Hollister-Whitney Company and another defendant for compensation paid or payable to John Bowie.

After Appellant filed a motion to dismiss Appellee's complaint, the Appellee filed an amendment to such complaint by adding an additional paragraph thereto seeking to plead an estoppel of the Appellant because of letters from its General Counsel to Appellee at the time of refusing to defend the suit. Appellant then filed a motion to dismiss the amendment to Appellee's complaint and by an order of Court was permitted to consolidate its motions and given leave to file an amendment to such consolidated motions.

The motions to dismiss stated grounds in substance that the doctrine of estoppel had no application to the instant case; that at the time of refusing to defend the Appellant denied coverage and called attention to the various provisions of the policy and endorsements and advised that coverage was not provided for the Aetna suit under the terms of its policy and therefore the Appellant would not undertake defense of such suit; that the suit brought by the Aetna Life Insurance Company was brought under and based upon Sec. 29, of the New York Compensation Law and was expressly excluded from coverage of said insurance policy by reason of the specific allegations of Exclusion No. 7 of Agreement V of the policy; that the accident occurred on an elevator which was erected, constructed and repaired solely by the Sommerville Elevator Company, Inc.; that the repair of said elevator was not in any manner made by the Appellee; that the alleged defect was located in a winding machine, or a part thereof, furnished by the Appellee to the said Sommerville Elevator Company Inc., and that the injuries sustained by John Bowie were not caused or occasioned by defective materials or workmanship of the Appellee on any elevator erected, constructed or repaired by the Appellee.

The trial Court sustained Appellant's motions to dismiss, as consolidated and amended, only as to the amendment to Appellee's complaint and overruled said motions in all other respects. The Appellant elected to stand on its said motions and the Court ordered that all material allegations of fact in Appellee's complaint were deemed admitted by the Appellant; that the Appellee was entitled to recover from the Appellant its damages and costs and assessed damages in favor of Appellee and against Appellant in the sum of \$1,093.08. It is this judgment that Appellant seeks to reverse.

It is conceded that the sole question in the case is whether or not the Appellant was bound under the terms of its policy to furnish a defense to the Aetna suit. It is suggested in the statement of Appellant's brief that because neither the order of dismissal entered in the suit of the Aetna Life Insurance Company against the Appellee nor the grounds for said order were pleaded in the complaint of the Appellee, that the allegations of successful defense and dismissal as to Appellee, are in effect equivalent to stating that the amended complaint of the Aetna Company did not state or show a liability on the part of the Appellee, and therefore, did not show such a case as the Appellant was obligated to defend under the terms of its policy. The Appellee asserts that the original suit of the Aetna Company was started against E. E. Hollister and F. H. Whitney, doing business as Hollister-Whitney Company when in fact the Appellee was a corporation; that after more than two years had elapsed the suit was started against the Hollister-Whitney Company, a corporation, and the cause of action consequently barred by the Statute of Limitations. It is true that if the order of dismissal and the grounds for the same had been pleaded in the Appellee's complaint the reason for the dismissal would be more clearly shown. However, an examination of the amended complaint of the Aetna Company against the Appellee, admitting all of its statements to be true, inclines us to the belief that it would be difficult to say that such complaint does not state a good cause of action.

The Appellant contends that in the Aetna suit the piece or part alleged to have caused John Bowie's injuries was manufactured by Appellee under a contract with Sommerville Elevator Company and that such part when it broke was shipped by the Sommer-

ville Elevator Company to the Appellee, and when re-built and repaired was shipped back to that Company by the Appellee. They further urge that the original and subsequent installation of the part in the elevator installed in the building in New York City wherein Bingham Bros. Company had their place of business was done solely by the Sommerville Elevator Company and not by the Appellee. They further state that the Appellee never originally installed the engine or any part thereof, and never re-installed it after it was re-built or repaired; that everything the Appellee did was done under a contract between it and the Sommerville Elevator Company. Because of the foregoing facts the Appellant insists that the claim of the Appellee does not come within the coverage of Appellants insurance policy. A determination of that question depends upon the interpretation and meaning of the provisions in Endorsement No. 4, of said policy. The reading of that Endorsement shows that for an additional consideration the policy was extended to cover the liability of the insured for any claims which may be made by any person or persons not employed by the Insured, for injuries or death arising out of any accident occurring during the term of the policy, on any elevator or elevators erected, constructed or repaired by the Insured at any time and caused by defective workmanship or materials used in the construction or repair of such elevators. The Endorsement further states that "defective material and workmanship coverage" is meant to apply to elevator accidents occurring during the policy period but occurring after the work of the Insured thereon has been completed but which accidents are alleged to have resulted from the Insured's negligence occurring at any previous time as respects material, workmanship, installation, inspection or repair.

The amended complaint of the Aetna Life Insurance Company against Appellee directly charges that John Bowie, who was not an employee of Appellee, was personally injured by reason of the negligence of the Appellee in the manufacture and construction of an elevator winding machine at its plant in Quincy, Illinois, and in the re-building and the installing of new parts in said winding machine at its plant in Quincy, Illinois, such negligence consisting of improper design or workmanship and the use of defective materials.

The title of the policy in controversy is distinctly named, "Manufacturers Public Liability Policy." The

location of the Appellee as described in the declarations of the policy was at Quincy, Illinois.

We agree with counsel for the Appellant that a policy of insurance is a contract like any other contract and is construed by the same rules of construction applicable to other contracts. *Capps v. National Union Fire Ins. Co.* 318 Ill. 350. Also that in interpreting a contract of insurance the Court must give to the terms used their ordinary, natural and grammatical meaning, *Jabara v. Equitable Life Insurance Society*, 280 Ill. App. 147.

We are impressed from our study of the contract of insurance in this case, together with its riders and endorsements, that the policy was designed to cover machines, parts and repair thereof manufactured at the location named in the policy, Quincy, Illinois. We believe that Endorsement No. 4, under the provision of defective materials and workmanship respecting material, workmanship, installation, inspection or repair was intended to cover and did cover the manufacture of the winding machine which was repaired or re-built, and parts thereof renewed, by the Appellee and furnished to the contractor for installation of an elevator in a building located in New York City and that the Appellant cannot escape liability because the Appellee did not actually install the elevator or make repairs thereon at the building in said City.

Neither are we impressed or convinced that there is an obvious distinction between the repair of an elevator and the repair of a part or material used in the repair of said elevator which would take this case out of the policy in controversy.

The Appellant further insists that the suit of the Aetna Life Insurance Company was brought against the Appellee for the compensation paid by said Company to one John Bowie, and that therefore, it was an action based upon Sec. 29, of the New York Compensation Law and expressly excluded from coverage under said Insurance policy by the terms of Exclusion No. 7, under Agreement No. V thereof. We do not consider that the suit filed by the Aetna Company was brought under the provisions of the New York Workman's Compensation Act. The action was based upon the negligence of the Appellee and a suit for damages for injuries arising out of such negligence. Sec. 29, of the New York Workman's Compensation Act did not create any obligation on the part of the Appellee to pay any compensation but simply transfers the em-

ployee's action to the employer by operation of law. Sec. 29 of the Illinois Workman's Compensation Act is very similar and in construing that Section our Court said in the case of *Joseph Schlitz Brewing Co. v. Chicago Railways Co.*, 307 Ill. 322:

"We feel bound to hold that the right of the employer to sue is not a new cause of action created by Section 29 but is the employee's right of action taken from him and transferred to the employer."

The Aetna Life Insurance Company by reason of said Section merely stood in the shoes of John Bowie, the injured person, and the amount of damages claimed or to be recovered in the Aetna suit was not in any way measured by or controlled by the Workman's Compensation Law.

Because of the views expressed herein, it is our conclusion that the clause in the policy providing or calling upon the Appellant "to settle or defend each claim and suit even though wholly groundless brought against the insured to enforce the payment of damages for such injury or death" and by virtue of the provisions of Endorsement No. 4, the Appellant was bound to defend the suit of the Aetna Company against the Appellee and therefore the judgment of the Circuit Court will be affirmed.

Affirmed.

PUBLISHED IN ABSTRACT

Raymond F. Sheets, Sr., Administrator of the Estate of
Estella J. Sheets, Deceased, Plaintiff-Appellant, v.
Metropolitan Life Insurance Company, a
corporation, Defendant-Appellee.

Appeal from Circuit Court Hancock County

OCTOBER TERM, A. D. 1938

298 1.A. 631³

Gen. No. 9147

Agenda No. 17

MR. JUSTICE FULTON delivered the opinion of the Court.

This suit was brought by Raymond F. Sheets, Sr., as Administrator of the Estate of Estella J. Sheets, Deceased, against the Metropolitan Life Insurance Company, the Appellee, based upon a policy of life insurance issued by the Appellee upon the life of Estella J. Sheets.

The complaint set forth the issuance of the policy sued upon, a copy of which was attached to the said complaint; the death of the Insured on December 31, 1936, while the policy was then in full force and effect; the issuance of Letters of Administration to the Appellant; the averment that all the monthly premiums on the policy had been paid; that the Appellant had performed all the conditions precedent entitling him to payment of the policy, and that the Appellee had failed to pay the amount due under the policy. There was no application attached to the policy but upon the second page thereof appears the following conditions:

"This policy constitutes the entire agreement between the company and the insured and the holder and owner hereof. Its terms cannot be changed, or its conditions varied, except by the express agreement of the company evidenced by the signature of its President or Secretary. * * *

The Company assumes no obligation prior to the date of issue hereof. * * *

It, (1) the insured is not alive or is not in sound health on the date of the issue hereof; or if (2) before the date of issue hereof, the insured has been rejected for insurance by this or by any other company, society or association, or has, within two years

before the date of issue hereof, been attended by a physician for any serious disease or complaint, or, before said date of issue, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, unless such rejection, medical attention or previous disease is specifically recited in the space, 'Space for Endorsements' on the fourth page in a waiver by the company; or if (3) * * * then, in any such case, the company may declare this policy void and the liability of the company in the case of any such declaration or in the case of any claim under this policy, shall be limited to the return of premiums paid on the policy, except in the case of fraud, in which case all premiums will be forfeited to the company."

An amended answer was filed by the Appellee admitting the issuance of the policy in question; the death of the Insured; the appointment of the Appellant as Administrator, and the payment of the monthly premiums. The amended answer denied that the Plaintiff had performed all the conditions required by the policy and tendered a return of all premiums paid upon the policy, and further alleged that at the time of the issuance of the policy on November 1, 1936, the Insured was not in sound health but was suffering from a serious heart disease, to-wit: chronic valvular heart disease, to-wit: mitral insufficiency, and that the Insured had within two years of the date of the issuance of this policy been attended by a physician for a serious disease, to-wit: chronic valvular heart disease, to-wit: mitral insufficiency, and that the Insured on the date of the issuance of the policy and prior thereto knew that within two years prior to the date of the issuance of said policy that she had been treated by a physician for this heart disease, and that she also knew she had suffered from this same heart disease within the two year period prior to the issuance of the policy. That the Insurer did not know these facts. That the Insured had been treated by her husband, a physician, for this same heart disease within the period of two years prior to the date of the issuance of the policy, and that the condition of the health of the Insured at the time of the issuance of the policy was well known to her. That all of which facts were known to the Insured and unknown to the Insurer. That the proof of death, assigned by the attending physician, gave mitral insufficiency as the cause of death, and that she had been attended by the physician

signing the death certificate within two years prior to the issuance of the policy. That the liability of the Insurer is limited to the amount of the premiums paid which were tendered in the Court.

The Appellant filed a reply to the amended answer denying all of the allegations of the said amended answer with reference to the Insured not being in sound health, suffering from serious heart disease or that she had knowledge of any such disease, and also denying any treatment by a physician for such disease within a period of two years before the issuance of the policy.

Upon the trial of the case the Appellant offered in evidence the policy sued upon as Plaintiff's Exhibit 1, to which offer the Appellee objected assigning as grounds therefor that the policy was not admissible until the Appellant had made proof that the Insured was in sound health at the time of the issuance of the policy and had not within two years before the date of the issuance of the policy been attended by a physician for any serious diseases or complaints, or until proof had been made that before the date of the issuance of the policy the Insured had not been afflicted with disease of the heart. The Court sustained the objection and refused to admit in evidence the policy offered as Plaintiff's Exhibit 1. Appellant then offered the Letters of Administration which were admitted in evidence and rested. Thereupon the Appellee made its motion for a directed verdict. The Court allowed the motion for a directed verdict and instructed the jury to return a verdict for the Appellee except as to the amount of the tender. A motion for new trial having been overruled, judgment was entered in favor of the Appellee and in bar of the Appellant's cause of action, from which judgment this appeal is prosecuted.

The Appellant presents two reasons to the Court why the case should be reversed, First, that under any view of the case the policy was admissible because all of the evidence could not be introduced at the same time, and if the Court had admitted the policy first, the Appellant could be called upon to make the proof insisted upon by the Appellee. In case he did not make such proof and the Court found that such proof was necessary as a part of the Appellant's case, then the Court could control the situation by a directed verdict. Second, was it necessary in any event for the Appellant to make the proof insisted upon by the Appellee as a

part of Plaintiff's case; or did Appellant make out a prima facie case under the pleadings when he offered in evidence the policy and certified copy of Letters of Administration?

In support of his position the Appellant has cited and analyzed a number of cases wherein policies of insurance have been sued upon where an application was made a part of the policy. In some of those cases the Courts have held that the burden of proof was on the Defendant to show that material statements contained in the policy were false and fraudulent but under circumstances different from the facts in this case. In one or two cases the defenses of false representations were set forth by special plea and under that state of pleadings the Court held that it was a special affirmative defense and that the defendant was called upon to prove the facts alleged in their special plea. One of such cases was *Hamer v. Globe Mutual Life Ins. Co.* 243 Ill. App. 109. In that same case, however, the Court said:

"If an Insurer wishes to make it a condition precedent to the right of the beneficiary to collect the insurance provided for, that the Insured be in sound health at the time the policy is delivered them, in our opinion, that must be accomplished by language in the policy clearly to that effect. It may not be done by some paragraph in the body of the policy, substantially amounting to a recital of the agreement which the Insured has made in his application in the course of his answers to questions there put to him."

In other cases where the false representations were made by answers to questions in an application which was made a part of the policy the Courts have usually treated the answers to such questions as representations and not as warranties. In the present case the conditions and agreements contained in the policy that if the Insured is not in sound health on the date of issue of said policy or that she had not been treated for a serious ailment within two years prior to the issuance of the policy and that she was not suffering from the disease specified in the policy, then the Company might declare the policy void and the liability of the Company be limited to the return of premiums paid, is definitely and clearly set out in the insurance contract, and by the weight of authority is, in our judgment, construed to be a condition precedent. In the case of *Lewandowski v. Western and Southern Ins. Co.*, 241 Ill. App. 55, a policy of insurance was involved

where no medical examination of the Insured had been made by the Company and where the policy did not in turn make the application a part of the policy or refer to it in any way. One of the conditions provided for in the policy stated, "No obligation is assumed by the Company unless on the date and delivery thereof the Insured is alive and in sound health". In reversing a judgment in favor of the Plaintiff, the Court said:

"Upon the trial, the plaintiff introduced the policy of insurance and rested. Thereupon defendant moved for an instructed verdict in its favor, but the motion was denied. This ruling was error. The stipulation in the policy to the effect that the insurance company assumed no obligation unless the insured was in sound health at the time of the delivery of the policy was a condition precedent, which it was incumbent upon the plaintiff to affirmatively prove in order to recover on the policy, and on the failure of plaintiff to prove that her son was in sound health when the policy was delivered, defendant was entitled to an instruction to find for the defendant."

In the case of *Daniels Motor Sales Co., v. New York Life Insurance Co.*, 220 Ill. App. 83, the application contained the following recitation, "I agree as follows: That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my life time and good health." The policy contained the following provision, "This policy and the application therefor, copy of which is attached hereto, constitute the entire contract." In affirming a judgment in favor of the Defendant the Court said:

"The court, in this condition of the record, lacking, as it did, proof that Brinkman (the insured) was in good health when the policy was delivered, refused to admit it in evidence, and on motion of defendant instructed a verdict in its favor. Plaintiff contended that proof of the ill health of Brinkman was a matter of affirmative defense, but the court held with defendant that proof of the fact of good health was a condition precedent to the right of recovery, that the onus of such proof primarily rested upon plaintiff, and that without such proof there could be no recovery.

"Under the law in this State the condition that Brinkman should be in good health at the time of the delivery of the policy was a condition precedent,

making it incumbent upon plaintiff to prove affirmatively that Brinkman was in good health at such time before it could recover upon the policy. *Ellis v. State Mut. Life Assur. Co.*, 206 Ill. App. 226, where the court said:

‘We are of the opinion that the stipulation in the application and policy in question, providing that the policy shall not take effect until actual delivery to the applicant while alive and in the condition of health he was in at the time the application was taken, is a condition precedent and, unless such stipulation has been performed, appellee would not be entitled to recover in this case.’

“To like effect is *Weber v. Prudential Ins. Co.*, 284 Ill. 326; *Lee v. Prudential Life Ins. Co.*, 203 Mass. 299.

“A condition precedent of the character of the one under discussion must be proven by the party seeking to recover under the contract, and the failure to make such proof will defeat a recovery. *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474.”

Many other cases in Illinois and other jurisdictions have adopted and concur in this same rule stating in effect that where the instrument sued on, such as the policy in question in this case, contains conditions precedent to its becoming effective, that then when suit is brought upon such instrument the burden of proof is upon the Plaintiff to show a compliance with the conditions precedent. The burden of proof was upon the Appellant in this case to prove that the Insured was in sound health on the date of the issuance of the policy, and that before the date of issue of the policy she had not suffered from any disease of the heart and that she had not within two years before the date of the issue of the policy been attended by a physician for any serious disease or complaint. The appellant in this case did not prove or offer to prove the facts necessary to a recovery to show a compliance with the conditions above set forth. In such a situation we believe the Trial Court properly granted the motion of the Appellee to direct a verdict in its favor except as to the amount of the tender for premiums paid. The judgment of the Trial Court will therefore be affirmed.

Judgment Affirmed.



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Opinion filed Jan 20 1938
Abstract
PUBLISHED IN ABSTRACT

Raymond Stadler and the First National Bank of
Piper City, a corporation, Plaintiffs-Appellees,
v. W. F. Holmes, Assignee of Martin Dooley,
Receiver of the Commercial National Bank
of Chatsworth, Illinois,
Defendant-Appellant.

Appeal from County Court of Ford County.

OCTOBER TERM, A. D. 1938

298 I.A. 631⁴

Gen. No. 9153

Agenda No. 23

Mr. Justice Fulton delivered the opinion of the Court.

On July 8, 1931, a judgment was entered by confession in the Circuit Court of Livingston County, Illinois, by the Receiver of the Commercial National Bank of Chatsworth, against Sam Stadler. A transcript of said judgment was duly filed in the Circuit Court of Ford County on July 14, 1931. An execution was issued and delivered to the Sheriff of Ford County on the same date and personally served upon Sam Stadler, and returned on October 13, 1931, in no part satisfied. On August 6, 1937, Martin Dooley, the successor Receiver of the Commercial National Bank of Chatsworth, assigned said judgment to the Defendant-Appellant, W. F. Holmes, which assignment was duly filed in the office of the Circuit Clerk of Ford County on August 25, 1937. On the same date an execution was issued and delivered to the Sheriff of Ford County, personally served upon Sam Stadler and shortly thereafter a levy was made by the Sheriff on the personal property of Sam Stadler.

On December 14, 1937 the Plaintiffs-Appellees, Raymond Stadler and the First National Bank of Piper City filed a notice of trial of right of property with the said Sheriff. By agreement of parties said cause was immediately tried before a jury of six in the County Court of Ford County.

The Appellees based their claim upon the following facts which were introduced in testimony. In 1921, Sam Stadler owed the First National Bank of Piper

City, \$6,760.00. By 1930 this indebtedness was reduced to \$5,100.00. Sam Stadler and his wife, Mary Stadler, were signers on the notes representing said indebtedness owing to the bank. Sam Stadler's financial condition became somewhat desperate and two of his notes were required by the examiners to be charged off. The examiners also insisted that the remaining note must be reduced or secured or proceedings instituted to collect the same. Thereupon the Appellee, Raymond Stadler, son of Sam Stadler, was called into the bank and informed of the situation. As a result of a conference and at the request of the bank Raymond Stadler signed his father's notes. Some time after the execution of these notes and during the year 1936 there was some discussion concerning security to be given Raymond Stadler for signing the notes and a chattel mortgage was suggested. On June 16, 1937, the indebtedness had been reduced to \$4,100.00 and a chattel mortgage for the sum of \$3,000.00 was made, executed and delivered by Sam and Mary Stadler to the son Raymond for the purpose of giving Raymond protection on his signature to the notes given the bank. The chattel mortgage and the chattel mortgage note were executed in a lawyer's office and later acknowledged by Sam and Mary Stadler before Ferd A. Luther, president of appellee bank. Ferd A. Luther was a brother-in-law of Sam Stadler, the mortgagor, and uncle of Raymond Stadler, the mortgagee, and Co-Appellee. The said Luther acting as the president of the Appellee bank having learned of the existence of the chattel mortgage suggested to Raymond Stadler that as the line of credit which the bank had extended to Sam was under criticism Raymond should place the chattel mortgage note with the bank as additional security to the notes which Raymond had endorsed for his father. Raymond told the bank president that the note and chattel mortgage were in the hands of the attorney who had prepared them and authorized the said Luther to secure the chattel mortgage and the chattel mortgage note from the attorney's office and that he, Raymond, would stop in some time and endorse the note. Raymond Stadler testified further that through oversight he had never endorsed the chattel mortgage note. Both the note and the chattel mortgage have been in the possession of the bank ever since the bank president secured them from the attorney's office. The chattel mortgage covered practically all of Sam Stadler's personal assets.

The jury returned a verdict finding the issues for the plaintiffs and judgment on the verdict was entered in favor of the plaintiffs on the 15th day of February, 1938.

It was the contention of the Appellant that the chattel mortgage was given for the purpose of hindering and delaying creditors. They advance and urge three reasons for a reversal of the judgment.

It is first contended by the Appellant that he was unreasonably restricted in his cross-examination of the Appellees. We have examined the record and find that in two or three instances the trial court sustained objections to questions asked by Appellant on cross-examination where it would not have been improper to permit the questions to be answered but further investigation shows that through subsequent questions and answers the information desired by the Appellant was secured so that the rights of the Appellant were not prejudiced by the rulings of the Court. The latitude on cross-examination is largely within the discretion of the trial court. A witness may be cross-examined as to his direct testimony in all its bearings and as to whatever goes to explain, modify or discredit what the witness has stated in his first examination. *Chicago City Ry. Co. v. Creech*, 207 Ill. 400. In our opinion the rulings of the Court on objections to cross-examination were substantially within correct rules of evidence and since the Appellant procured the information desired in succeeding questions and answers there was no serious error committed. We concede that in cases where fraud is charged great latitude is shown on cross-examination but where there is little or no evidence of fraud proven on the trial of the case such as are shown by the circumstances surrounding the transactions in this case there was no such restriction shown on cross-examination as to constitute error.

It is next contended by the Appellant that the trial Court erred in giving certain instructions to the jury on behalf of Appellees with reference to the effect of transfers or conveyances without including (a) "Good faith" clause, or by failure to insert language to show that the transaction was or should have been free from fraud. The instructions complained of appear to have stated correct principles of law and are not peremptory in their nature. In support of Appellants' position he cites the case of *Grieb v. Caraker*, 57 Ill. App. 678. The instruction given in that case was a peremp-

tory instruction to find for the claimant upon a set of facts set forth in the instruction. In such an instruction it is necessary to set forth every essential element of the proof in order to tell the jury to find for the Plaintiff, and therefore the failure to include the question of good faith was held to be error. It is also significant that in that case the issues were contested and the evidence conflicting on the question of fraud and it was essential that the jury be accurately instructed as to the law. In the present case there is hardly a semblance of proof in support of the charge of a fraudulent conveyance. The testimony shows the transactions between the father and son and the bank to have been the ordinary and orderly business course followed in matters of similar character. There is no testimony in the record casting any suspicion upon the bona fides of the indebtedness to the bank, the signature of the son upon the notes or upon the execution of the chattel mortgage for the protection of the son for his endorsement.

The Appellant further complains of the refusal of the Court to give certain instructions offered on the part of the Appellant. As an example he asked for the following instruction:

“That clearer proof is required to sustain the validity of a chattel mortgage where the parties thereto are parents and child than where the parties are in no way related to each other.”

This instruction is not prefaced in any manner by the statement that a conveyance between father and son is not in and of itself fraudulent and might tend to mislead the jury. The other instructions refused on the part of the Appellant are subject to similar criticism. Appellant's instructions numbers 1 and 2, presented to the jury the question of defrauding the right of creditors. We cannot find that the instructions were harmful or prejudicial to the Appellant.

The Appellant also insists that the verdict is contrary to the weight of the evidence. It is the judgment of this Court that the evidence fully supports a verdict finding issues for the Appellee. As heretofore stated in this opinion the testimony of Ferd A. Luther, the president of the First National Bank of Piper City, Sam Stadler, the mortgagor, and Raymond Stadler, the mortgagee, relates the history of an indebtedness carried by the said bank for a long period of years. A criticism by the bank examiners of the line of credit extended to Sam Stadler, the effort by the

bank to reduce the amount of indebtedness and to secure additional surety and collateral, the procuring of the signature of Raymond Stadler to help his father who was in financial difficulties, the making and delivery to Raymond Stadler the chattel mortgage note and chattel mortgage to protect him for acting as surety and finally the delivery of such note and chattel mortgage to the bank as additional security to the Sam Stadler indebtedness. All of these items of testimony were competent to submit to a jury as to the bona fides of the transactions between the father and son and the bank. As against this testimony there is only the fact that Sam Stadler and Raymond Stadler and Ferd A. Luther were related, the entry of the judgment by the receiver of The Commercial National Bank of Chatsworth in Livingston County, in 1931, the assignment of said judgment to the Appellant in August of 1937, the issuance of the execution upon said judgment and the levy upon the personal property of Sam Stadler by the Sheriff. While it is true that transactions which take place between closely related parties should be more closely scrutinized than transactions between strangers yet the fact that the relationship in itself is not sufficient to set aside a conveyance unless there is some evidence of fraud connected with the transaction.

The other questions raised by the Appellee in support of the judgment are not necessary for the consideration of this case in view of the conclusions reached by this Court in this opinion. The judgment of the County Court of Ford County is therefore affirmed.

Affirmed.



Tabitha Phillips, Plaintiff-Appellant, v.

T. M. Chambers, Defendant-Appellee.

Appeal from Circuit Court of Cumberland County.

OCTOBER TERM, A. D. 1933

298 I.A. 631⁵

Gen. No. 9127

Agenda No. 3

MR. JUSTICE HAYES delivered the opinion of the Court.

This is an appeal from the decree of the Circuit Court of Cumberland County, denying the plaintiff (appellant) the right to foreclose a mortgage against the defendant (appellee). In said decree, suit was dismissed at plaintiff's costs.

The complaint charges that, on the 18th day of November, A. D. 1915, T. M. Chambers, and L. A. Chambers, being indebted to the plaintiff in the sum of thirty five hundred (\$3500.00) dollars, executed their promissory note, of that date, due in four years, with interest at the rate of six percent per annum, and that on the next day,—the 19th day of November, 1915,—each in their own right as husband and wife, to secure said note, conveyed to the plaintiff, one hundred and seventy nine and one-half (179½) acres of land. The said deed was acknowledged on January 22, 1916, but not recorded until July 30, 1935. L. A. Chambers, the wife of the defendant, died on the 18th day of July, 1935, testate, leaving T. M. Chambers sole beneficiary under said will.

The complaint further charges that the said T. M. Chambers has not yet paid all of said \$3500.00 note, and that the following credits appear on the back of said note,—January 22, 1916—\$1,000.00;—no date—\$500.00; interest to March 1, 1920. The complaint also charges that there are five other credits running from April 19, 1926 to April 1, 1932, that have not been credited on the back of said note which should be, and assigns as the reason for non-endorsement the fact that the note was not in plaintiff's possession, due to the fault of the defendant and plaintiff stands ready to make said credits on the back of said note.

In the answer defendant, first denies making the note in question; second, denies making the mortgage, and third, denies making any payment on said note or mortgage within ten years prior to the commencement of this suit, and sets up specifically the Statute of Limitations.

The defendant takes the position here that there is no evidence for this court to consider on the appeal, for the reason that the trial proceedings are not certified to by the clerk of the trial court, and not incorporated in the transcript of the record, but filed separately, and that there is no showing that the report of the trial proceedings was filed with the trial court.

Under Supreme Court Rule 36, section 2, the trial clerk should make up a record on appeal, by attaching together all of said records and documents specified in the praecipe, and number the pages consecutively, and the same should be arranged in chronological order.

In the making up of this record, this rule was not followed. The proceedings at the trial were bound up separately and filed in this court separately, but on the same date that the record was filed. The clerk of the trial court included the proceedings at the trial in said case in his certificate. It appears from the affidavit of Thomas M. Connor on file, that the report of trial proceedings in this case was placed in the custody of the Clerk of the Trial Court on the 18th day of February, 1938; signed by the trial judge on the same date; and filed by the Clerk of said court on said date. While the affidavit of the defendant fails to negative the making and filing of the proceedings at the trial, it appears that the proceedings were made and certified to by the Trial Judge; filed with the clerk of the court below, and the irregularity of not binding them together with the rest of the record, which is a violation of rule 36, can be corrected by this court ordering further authentication. Under section 74, Chapter 110, all matters in the trial court record actually before the court on appeal may be considered by the court for all purposes, but if not properly authenticated, the court may order such further authentication as it may deem advisable. The irregularity in the record is not of such character that would justify this court in refusing to review the evidence.

It appears that in 1904, the defendant T. M. Chambers, his wife, L.A. Chambers, and the plaintiff Tabitha Phillips,—who was the sister of Mrs. Chambers,—

bought the farm in question, consisting of approximately 179½ acres, from W. A. Coats and Rebecca A. Coats. A Warranty Deed was executed January 16, 1904, conveying said premises to the defendant, his wife, and the plaintiff herein, which deed was recorded in the Recorder's Office. On the same day, Chambers, his wife and sister-in-law, executed a mortgage back to the Coats' for eight thousand six hundred fifty (\$8,650.00) dollars. Later, on July 26, 1913, Coats and his wife executed a warranty deed correcting the description. This deed was never recorded. It further appears that T. M. Chambers and his wife made a contract with the plaintiff on the 21st day of March, 1907, which contract recited that plaintiff had paid her full share of the Coats' mortgage, and that the balance of said unpaid mortgage, amounting to \$4,750.00, was owed by Chambers and his wife. The contract provided, that if Chambers and his wife defaulted in the payment of said balance, then the plaintiff would have authority to pay the same, and in that event, Chambers and his wife, agreed to execute a deed to the plaintiff. This contract was never recorded. The mortgage in question was executed by T. M. Chambers and L. A. Chambers to Tabitha Phillips on the 19th day of November, 1915, and acknowledged before a Notary Public on the 22nd day of January, 1916, and recorded on the 30th day of July, 1935, covering an undivided one-half interest to the land in question and securing a note of \$3500.00, due in four years with interest at six percent. The note is signed by T. A. Chambers, (rather than T. M. Chambers), and L. M. Chambers.

On the question of whether or not the defendant T. M. Chambers signed the note and mortgage which the plaintiff seeks to foreclose, it appears from the testimony of the plaintiff that she was present in Fitzpatrick's office,—a real estate man in Casey, Illinois,—on January 22, 1916, and saw the defendant and his wife sign the note and mortgage in question. On the back of the mortgage appears the certificate of the Notary Public taking the acknowledgment.

George F. Shimmel, a banker for thirty years at Casey, Illinois, who had known the defendant for many years; had business experience with him during that time and was acquainted with his signature, testified after examining the signature, "I would say that was his signature on both exhibits."

Mr. Doit Young, testifying for the plaintiff, stated he lived at Casey, Illinois; had been engaged in the banking business there for forty-five years, that he

was acquainted with the defendant and familiar with his signature, and that he had seen him write his name on checks, deeds and documents. After examining the note and mortgage in question, he replied: "Well, I see I wrote that note and mortgage, but it wasn't signed before me, but that looks like his signature all right; if it isn't his it's an awful good forgery. That applies to both, the signature is the same on both. I would consider it his signature."

The defendant testified that he did not sign Exhibits 1 and 2, being the mortgage and note in question. He was the only witness testifying in behalf of the defense on the subject of his signature to the note and mortgage. The only other circumstance in the proof that supports him is that the note was signed T. A. Chambers instead of T. M. Chambers. In weighing the testimony, on this phase of the case, it appears that the plaintiff testified she saw the defendant sign both instruments. Defendant denies the signature. The plaintiff is supported by the certificate of the Notary Public, who took the acknowledgment, and the two bankers' testimony that in their judgment the signatures are of the defendant. These two men appear as disinterested parties, with ample experience to know and judge the signature of the defendant, and in this instance, it appears the weight of the evidence is with the plaintiff.

On the remaining branch of the case which is whether or not the note and mortgage were surrendered by the plaintiff to the defendant in 1921, and whether or not there were any new promises to pay, or part payments of principal or interest thereon, it would appear from the record that up to 1921, the plaintiff had possession of the note and mortgage for she testifies: "interest paid to 1920.—March 1st, was in my writing, made by myself." Plaintiff then claims she gave the mortgage and note to her sister, the wife of the defendant, so that she could take better care of them. It was in this connection that defendant testifies he first learned of the \$3500.00 note and mortgage in question, which was at the time he paid the \$650.00 to Miss Phillips in 1921, and when he got the note and mortgage for \$3500.00 returned to him which remained in his possession until 1931. He states he kept them, with other papers, in his satchel in a garage, and that in 1931 while the sister of the plaintiff was at his home, he went to a neighbor's, and while he was gone, the papers were taken out of the garage by the sister, Mrs. Betsy Clem. He further testifies he has not authorized

any payments to be made on that note and mortgage for the last ten years and that "he never got any money or anything else of value, for that note and mortgage." Plaintiff's contention as to part payments after 1921 which were not endorsed on the note was supported by the testimony of Adistine Rizor. Her testimony, however, is weakened considerably by her being too willing and always at the right place when these payments were claimed to have been made, and does not carry much conviction. Taking the record as a whole and considering the circumstances, this note and mortgage were in the possession of the defendant or defendant's wife from 1921 to 1931 and there were no endorsements on the back of it and no demands made or claimed to have been made by the plaintiff on the defendant to pay principal or interest during those years and up to 1935, and that the mortgage was not recorded until almost twenty years after it was executed. Considering further that Mr. and Mrs. Chambers had no children; that Mrs. Chambers died testate, and gave everything to her husband; and that her sister, the plaintiff herein, was unmarried, it would be a reasonable deduction that the filing of this suit and the claiming under the mortgage in question, was an after-thought prompted by dissatisfaction caused by Mrs. Chambers leaving everything to the surviving husband.

We are required to hold that the weight of the evidence failed to show any part payment or any promise on the part of the defendant for more than ten years prior to the institution of the suit, and that the Chancellor arrived at the correct decision. There is nothing in this record that would warrant our changing the decree entered by the Circuit Court.

It has always been held that where a decree depended upon the facts, and the evidence was heard in open court, the Chancellor was in a better position than a reviewing court by reason of his opportunity to observe the witnesses and their demeanor while testifying, and that unless a reviewing court could say the chancellor had palpably decided the case contrary to the evidence his findings would not be disturbed *Gray v. Solomon*, 338 Ill. 433, 440.

For the reasons herein set forth the decree of the Circuit Court is hereby affirmed.

Decree Affirmed.

Def. con - Jan 21, 1938
 Abstract
 PUBLISHED IN ABSTRACT

**Hershel Cline, Plaintiff-Appellant, v.
 H. D. Junkin, M. D. and The Paris
 Hospital, a corporation,
 Defendants-Appellees.**

Appeal from the Circuit Court of Edgar County.

OCTOBER TERM, A. D. 1938

298 I.A. 632

Gen. No. 9131

Agenda No. 6

MR. JUSTICE HAYES delivered the opinion of the Court.

Hereafter, in this opinion, Hershel Cline, plaintiff-appellant, will be referred to as plaintiff, and H. D. Junkin, and the Paris Hospital, defendants-appellees, as Defendants.

This is an appeal from the Circuit Court of Edgar County, by the plaintiff, from an Order dismissing his suit for want of prosecution, which Order was entered following the denial of a Motion for Continuance made by the plaintiff. A Motion to set aside the Order of Dismissal, and to reinstate the cause for trial was likewise denied. The basis of the appeal is, that the Trial Court abused its discretion in denying plaintiff's motion for a continuance and refusing to set aside the Order for Dismissal.

The Plaintiff charged in his complaint, that the defendants were guilty of mal-practice in taking care of his fractured leg. The defendants denied the allegation of the complaint, and the trial was had by jury which resulted in a disagreement. The defendants then moved for a judgment, notwithstanding the failure of a jury to reach a verdict. This motion was denied. The case was set during the November Term, 1937, to be tried the second time, for the third day of January, 1938. The exact date of the order of this setting does not appear in the record, but, from the affidavit of the plaintiff for continuance, it would appear that it was sometime prior to December 23, 1937. The plaintiff was represented, from the filing of the suit until just prior to dismissal, by C. A. Williams, an attorney of Casey, Illinois. Later the plaintiff employed additional

counsel consisting of Robert H. Moore of Michigan City, Indiana, and Samuel Moise of Gary, Indiana. All three lawyers participated in the first trial. The first trial occurred during the June Term, 1936. On January 3, 1938, that being the date on which the case was again set for trial, the plaintiff, by one of his counsel, C. A. Williams, filed a motion for continuance, setting up, first: that the plaintiff was seriously ill and could not attend the trial; second, that a material witness, Percy Williams was likewise ill and confined to a hospital; and third, that two of plaintiff's counsel namely Moore and Moise had lately withdrawn from the case, and that C. A. Williams, the remaining counsel, needed further time to procure additional counsel, he not being able to try it alone. This motion was supported by an affidavit of C. A. Williams, plaintiff's attorney. This affidavit is the only proof, shown by the record, in support of said motion for continuance, and it states that the affiant is plaintiff's attorney, and has been since the institution of the suit; that following his employment, the plaintiff employed additional counsel of more experience to aid in the trial, namely Moore and Moise, and that affiant telephoned and telegraphed said plaintiff, and Moore and Moise many times in the past week or ten days to make sure they were ready for trial on January 3, 1938; that Moore and Moise came to Clark County on the night of December 23, 1937, and had a conference with affiant and plaintiff, relative to said trial; that certain disagreements arose between the plaintiff and Moore and Moise over the trial of said cause; that thereafter it was uncertain to affiant what the position of the said Moore and Moise was in said cause; that affiant made diligent effort to contact the plaintiff by telephone and by personal interview on all of the dates inclusive from December 28th to December 31st, but that the only contact he could have was by personal messenger; that several messages were exchanged by that method due to poor telephone service, impassable roads, and plaintiff's ill health, so that affiant could not determine until December 31st, whether or not said Attorneys Moore and Moise would assist said affiant in the trial of said cause. Affiant was able to reach Attorney Moore by telephone on December 31st, and was then advised that Moore and Moise had withdrawn as counsel in said cause; that on December 31st, he contacted defendants' Attorneys Cotton at Paris, and Acton at Danville, by telephone, and requested a continuance. He further

states in said affidavit, that the plaintiff could not receive a fair trial on January 3, 1938, for the reason that he had insufficient legal representation.

Appellees contend in their brief that the affidavit in support of the motion for continuance, and the affidavits in support of the motion to vacate the order of dismissal cannot be considered by this Court, in the absence of a report of the trial proceedings, for the reason that the affidavits appearing in the record are not properly a part of the common law record, but should be included in the report of the trial proceedings. Appellees cite a number of authorities in support of their position, all of which, however, are prior to the adoption of the Civil Practice Act. The position taken by appellees was the correct one, prior to the change made by the Practice Act. Under section 74 of the Act, all distinctions between the common law record and the bill of exceptions on review are abolished, and the act specifically provides that the trial court record shall include every writ, pleading, motion, order, affidavit, and other documents filed or entered in the cause and all matters before the trial court which shall be certified as part of such record by the Judge thereof, and said statute further provides that all matters in the trial court record actually before the court on appeal may be considered by the Court for all purposes, but if not properly authenticated, the court may order such further authentication as it may deem advisable. Civil Practice Act, Chapter 110, Section 74, Ill. Statute, Bar Association, 1937.

To hold with appellees on this proposition, and for this Court to refuse to consider said affidavits on review, would be to nullify the expressed provisions of said statute, and this we cannot do, although it is true there is no report of the trial proceedings shown in the record. The record as it now stands would indicate that the only proof that was before the trial court, at the time the motion for continuance and the order refusing the motion to vacate the order of dismissal was passed on, was the affidavits included in the record and certified to by the Clerk.

Taking up the question as to error assigned on the Court's refusal to grant the motion for continuance applied for by the plaintiff at the time the case was called for trial, the plaintiff contends that the refusal of said motion amounts to an abuse of the Court's discretion. The exercise of this discretionary power, by a court, is never error unless it is clearly abused.

Corbly v. Corbly, 206 Ill. App. 527. Those who are experienced in trial practice know that in negligence cases, the plaintiff is eager to get a setting, and the defendant is inclined to hold back, and generally the trial judge has to assist the plaintiff in setting the case for trial and force the defendant to get ready and try it. In this case, it had been tried once and ended with a disagreement of the jury. It appears that during the November term, the plaintiff had it set for the second trial to be held on the third day of January, 1938. After a plaintiff receives the aid of the trial court in getting a definite date set, it is then incumbent upon the plaintiff to bear the responsibility and show due diligence in being ready, for after he forces a case to trial, it is not proper for plaintiff to treat his responsibility lightly, or sit idly by, and on the day of trial, after defendant is ready with his witnesses, to say he doesn't want to go to trial on that day, for this would not only be unfair, but it would upset the orderly conduct of the Court's business, and amount to a denial of justice to the defendant.

In reviewing the ruling of the trial court on the denial of the motion for continuance, the record must be taken as it was on the date of said ruling by the Circuit Court. It discloses that this was a Negligence Case, tried once, with a disagreement, and set a second time on motion of plaintiff, with ample opportunity for the plaintiff to get ready for trial; that defendants did get ready; that the only evidence submitted by plaintiff in support of said motion was the affidavit of plaintiff's attorney, C. A. Williams, which is in very indefinite and ambiguous terms; that there was no affidavit of the plaintiff as to his own sickness nor any certificate or affidavit of the attending physician; that the only thing in the entire affidavit that refers to the first ground for a continuance,—namely plaintiff's illness, is: "And that several messages were exchanged by that method due to poor telephone service and impassable roads, and due to plaintiff's illness so that affiant could not determine until December 31st, whether or not said attorneys could assist in the trial." There is no direct averment in the affidavit that the plaintiff was ill at the time, but it is stated therein by way of recital. It fails to state when plaintiff took sick; how sick he was; whether he was confined to his bed; whether the sickness was of a degree of severity to prevent his attending the trial, so plainly, on this ground, the affidavit is not sufficient. The second

ground on which the continuance was asked was that a material witness Perry Williams was ill and confined to the hospital at Terre Haute, Indiana. The affidavit of Mr. Williams, plaintiff's attorney, does not set forth anything in support of this ground, nor does the plaintiff make any showing in support thereof. The third ground set up in the motion for continuance is that Attorneys Moore and Moise, who had been associated with C. A. Williams, had withdrawn from the case. It appears from the affidavit that these two lawyers had a conference with the plaintiff and Williams in Clark County, on the night of December 23, 1937, or, eleven days before the date on which the case was to be tried, and that disagreements arose between those two lawyers and the plaintiff over the trial of the case; that it became uncertain, at that time, whether Moore and Moise would participate in the trial. It appears that plaintiff had full knowledge and notice of this situation and that he knew the case was set for January 3, 1938. There is nothing to show any diligence on his part from December 23, until January 3. It is apparent from the affidavit that he kept himself away from C. A. Williams, his original lawyer who was in the litigation during all the time, for Mr. Williams says in his affidavit that he made deliberate effort to contact the plaintiff by telephone and personal interview from December 28 to December 31. The affidavit of Mr. Williams further states they made an effort to get an agreement for a continuance, from the attorneys for the defendant, on the night of December 31. There is no showing made that either the plaintiff or plaintiff's attorney made any effort from December 23, up to the trial date to engage additional counsel or that remaining counsel made any effort to prepare for trial. There is a further statement in the affidavit, "That it is the honest opinion of the affiant that plaintiff herein cannot receive a fair trial on January 3, 1938, for the reason he has insufficient representation." This, of course, is a mere conclusion and expression of an opinion, and no facts on which it is based are set forth, while the record shows that plaintiff had chosen him as his original lawyer and that he had participated in the trial of the case once. The naked, unsupported statement that plaintiff had insufficient representation is not a justifiable answer for his lack of diligence in having a lawyer available and ready to try the case when reached. The foregoing are all the material matters before the trial judge when he passed on the

motion for continuance, and this Court, on review, has to decide it at the same point in the record as the trial judge did. Although it is true that in the latter motion to set aside the order of dismissal, the affidavits were more definite, and more facts were set out, yet that alone cannot affect the record as ruled on in the first instance, and from the state of this record, we cannot say that the trial Court clearly abused its discretion. If the Court was right in denying the motion for continuance, then it would be improper to permit it to be forced to grant a continuance by the withdrawal of counsel without a showing of due diligence on the part of the plaintiff to obtain, and have available, a lawyer who was able, ready and willing to try the case on the date it was set for trial.

The Circuit Court being warranted in its denial of the Motion for Continuance, it follows, as a matter of course, that it was warranted in refusing to vacate the Order of Dismissal, when the plaintiff failed to prosecute his suit on the date it was set for trial.

There being no reversible error in the record, the judgment of the Circuit Court is affirmed.

Judgment Affirmed.

286
Citation for Appeal
Abstract
PUBLISHED IN ABSTRACT

**E. O. Mayer, Plaintiff-Appellee, v. Burton A. Tyler and
Kate E. Tyler, Defendants-Appellants.**

Appeal from the Circuit Court of Logan County.

OCTOBER TERM, A. D. 1938

298 I.A. 632

Gen. No. 9134

Agenda No. 9

MR. JUSTICE HAYES delivered the opinion of the Court.

This is an appeal from the Circuit Court of Logan County, confirming a judgment that had been entered in the County Court of said county, by confession, in favor of the plaintiff and against the defendants, for the sum of one hundred seventy three and 82/100 (\$173.82) dollars. After leave had been obtained by the defendants to open the judgment and plead, the cause was transferred to the Circuit Court of Logan County on a petition for change of venue by the defendants. As a defense to said cause of action, the defendants set up a claim as a setoff, on account of legal services rendered to the plaintiff by Burton A. Tyler, one of the defendants, who is a practicing attorney, located at Mt. Pulaski, Illinois. His services were purported to have been rendered from the 18th day of May, 1925, to the 31st day of August, 1929. The note, on which judgment was entered, was dated June 13, 1927, for the sum of two hundred (\$200.00) dollars, and was payable September 13, after date. It was signed by B. A. Tyler and K. E. Tyler. There is an endorsement on the back of it,—June 17, 1933—\$150.00,—of which \$84.00 is interest, and \$66.00 is principal.

The grounds urged by the defendants for the reversal of the judgment are first; that there was a meritorious defense set up by the their setoff; second; the judgment is void, ab initio, in that the judgment and the Power of Attorney, incorporated in the note, granted power to confess judgment for the above sum and interest, and that said sum was \$200.00 rather than \$173.82.

Rule 26 of the Supreme Court provides that, if the motion and affidavit to open judgment entered by con-

fession discloses a defense on the merits to the whole or part of plaintiff's demand, and that he has been diligent in presenting his motion, the Court shall then sustain the motion either as to the whole or such part of said judgment to which a good defense has been shown, and the case shall thereafter proceed to trial. It is the position of the defendants here that the services rendered by Mr. Tyler, as attorney to the plaintiff, is a good defense to the judgment on said note, but this court has held to the contrary.

In the case of *Busse v. Muller et al*, 295 Ill. App. 101, this Court said: "A counterclaim or cross demand whether in the nature of a setoff, recoupment, cross bill in equity, or otherwise is not a defense on the merits to a demand of one or more plaintiffs against one or more defendants and for that reason a judgment will not be opened up to permit a defendant to file a counterclaim." The same rule, that a counterclaim is not a meritorious defense was adopted in *Stead v. Crane*, 256 Ill. App. 445, p. 452; *Smysor v. Glasscock*, 256 Ill. App. 29; *State Bank of Mansfield v. Stauffer*, 201 Ill. App. 132; *Boss v. Heffron*, 40 Ill. App. 652; *Koehler v. Glaum*, 169 Ill. App. 537.

The amount actually due on the note was \$173.82. The defendants contend, that the Power of Attorney authorized the confession in the sum of \$200.00, and that the exercise of the power for any different amount, even though it was less, voided the judgment. Their contention seems to be, that if the Power is to be exercised at all, it has to be for the amount of \$200.00, even though that amount was not due on the note. The Warrant of Attorney expressly waived and released all errors which might intervene in the entering of the judgment.

An application to set aside or open a judgment to grant leave to plead is addressed to the sound discretion of the Court, and calls for the exercise of the equitable power of the Court over its own judgments. For mere irregularities or defects in the proceedings the court will not set aside a judgment except where a good defense on the merits is shown, but if the judgment is unjust and against conscience, it will be opened, and permitted to stand a security until the case can be heard on its merits. *Blake v. State Bank of Freeport*, 178 Ill. 182, 183.

The entering of the judgment for the amount actually due on the note, even though it be for less than the amount of the note, and less than the amount au-

thorized by the Power of Attorney, does not fall in the category of meritorious defense that would warrant a Court in opening a judgment and granting leave to plead.

We find no error in this record that would warrant a reversal of judgment. Judgment of the Circuit Court is hereby affirmed.

Judgment Affirmed.

Opinion filed - Jan. 11, 1934
act

PUBLISHED IN ABSTRACT

**Bituminous Casualty Corporation, a corporation,
Plaintiff-Appellant, v. John C. Koehn, Jr.,
Doing Business as Merchants Delivery,
Defendant-Appellee.**

Appeal from Circuit Court of Vermilion County.

OCTOBER TERM, A. D. 1933

298 I.A. 632³

Gen. No. 9165

Agenda No. 30

MR. JUSTICE HAYES delivered the opinion of the Court.

This is a suit filed by the plaintiff (appellant) against the defendant (appellee) for premiums claimed on a Workmen's Compensation Policy, issued by the plaintiff to the defendant. The suit was originally started before a justice of the peace. There are no written pleadings. It was appealed to the Circuit Court and tried in that court by a jury, resulting in a verdict for the defendant against the plaintiff.

The defendant was located at Danville, Illinois, and engaged in the trucking business,—doing business under the name of the "Merchants Delivery". His business was divided about equally with short haul deliveries where he used light conveyances in and around Danville, and in long haul deliveries with large, heavy trucks, which were used to haul to Chicago and other points at a distance. The plaintiff was engaged in the business of writing insurance, indemnifying employers on account of liability under the Workmen's Compensation Act.

The only matter in dispute is the classification under the policy of the employees of the defendant, and the rate the premiums should be figured at.

The defendant obtained the policy in question from the plaintiff through their local representative Eugene Blary of Danville. At the time of the application, the defendant inquired of the agent about the classification,—as to what was a chauffeur and what was a truckman,—and stated to the agent that chauffeurs should be those who went out between eight and ten hours, making short runs; and truckmen, those who

made long distance runs. The agent replied that he didn't know if this could be done. He later reported to the defendant that it could be done. The defendant then made his payrolls up accordingly, making the classification in this way. These payrolls and premiums were sent to the plaintiff by the defendant each month for thirteen months.

The plaintiff contends that the policy provides that the classification and rates should be in accord with the Manual of Rates used by the company, and in force when the policy was issued. There is a provision of this kind in the policy. This Manual of Rates was not introduced in evidence, nor was it attached to the policy, nor is there any evidence to show it was ever furnished to the assured. Plaintiff's contention here has to do with the construction of the contract, and claims that the Manual of Rates is part of the contract, but the only evidence offered in this connection by the plaintiff, in the trial court, is that of the witness Ford, who is an employee of the plaintiff. This witness states his conclusions as to what is in the Manual of Rates, and makes his own construction on the meaning of the terms thereof. In his testimony with reference to the policy, rider and classification numbers, namely Truckmans 7219, and Chauffeurs 7380, he states that 7219 is contract hauling, in either short or long hauls, and adds that this is the ordinary and customary meaning. Number 7380 covers the merchant who delivers his own merchandise. He further stated that the National Council assigns the numbers. He had in his possession a manual which he referred to, and related his ideas on what was contained therein.

Now if the Court is to construe this policy, together with its riders and the Manual of Rates, it is necessary that it pass upon the Manual of Rates in its original state, not upon the second hand construction placed upon them by Mr. Ford.

Taking the record as a whole, we find that the assured, at the time of application, made inquiry as to the classification and rates, and the agent of the company afterwards told him that a classification could be made as he requested. The assured and the plaintiff placed the same construction on the policy for thirteen months. The name the defendant did business under, "Merchants Delivery" is enough in itself to give notice to the plaintiff as to the character of the defendant's business, namely, delivering merchan-

dise for others. That policy itself, and the many forms attached to it are long and complicated, and are printed forms prepared by the plaintiff.

Insurance business is highly competitive. To permit a company to go out and obtain business by representing that a classification and rate would be a certain price; and go ahead and take premiums for months thereafter, and then claim that the rate was wrong and that it should be four times as much, would amount to a fraud, and to construe a policy to have that effect is not favored by the law.

Where parties have adopted a particular construction of doubtful terms or conditions of a contract this court will follow the construction such parties have themselves placed upon it. *Wright v. Loring*, 351 Ill. 584, 589; *Keifer Coal Co. v. United Electric Coal Co.*, 291 Ill. App. 477.

The contract must be construed by the court unless its meaning is so ambiguous and uncertain as to call for extrinsic evidence to ascertain its meaning. The court in construing a contract should take into consideration the surrounding circumstances and should place itself as nearly as can be in the same situation as the parties who made the contract so that "it may view the circumstances as they viewed them and so may judge the meaning of the words." *New York Hamilton Corporation v. First Illinois Company*, 257 Ill. App. 125, 129.

The plaintiff bases his grounds for a reversal of the judgment on the classification contained in the Manual of Rates, and this, not having been introduced in the record, we cannot accept in lieu thereof the conclusion of the witness as to what it contains, for with equal force, the Defendant testified that the difference in these two classifications was not based on contract hauling, but on long and short hauls and light vehicles and heavy trucks. With the record in this shape the Court below, as well as the Jury, were warranted in adopting the classifications the parties themselves adopted over a period of thirteen months. The Judgment is therefore affirmed.

Judgment Affirmed.

